(FEDERAL MARITIME COMMISSION)
(SERVED DECEMBER 2, 1987)
(EXCEPTIONS DUE 12-24-87)
(REPLIES TO EXCEPTIONS DUE 1-15-88)

FEDERAL MARITIME COMMISSION

NO. 87-13

PATE STEVEDORE COMPANY OF MOBILE, ET AL.

v.

THE ALABAMA STATE DOCKS DEPARTMENT, ET AL.

NO. 87-17

ATLANTIC & GULF STEVEDORES OF ALABAMA
AND ALABAMA INSURANCE GUARANTY ASSOCIATION

v.

THE ALABAMA STATE DOCKS DEPARTMENT
AND AETNA CASUALTY & SURETY COMPANY

Complainants, four stevedoring companies and their insurers, are being sued in courts in Alabama by Aetna, the insurer of ASD, a marine terminal operator, as a result of accidents to four longshoremen occurring on ASD's premises. The complainants allege that ASD and Aetna are attempting to make complainants indemnify Aetna and ASD for ASD's own negligence, an exculpatory practice which is unlawful under the Shipping Acts. Complainants want the Commission to find ASD's tariff provisions, under which Aetna is suing, to be declared unlawful, to order Aetna to cease and desist from its suits, and some complainants seek reparations. Respondent Aetna contends that the Commission has no jurisdiction over it and that it is not seeking exculpation for ASD's negligence. Respondent ASD claims sovereign immunity of Alabama, lack of jurisdiction over its Bulk Plant, and that it has conformed its tariffs to the Commission's regulations. The parties have moved for summary judgment and for dismissal. It is held:

(1) Respondent Aetna is an insurance company, is not engaged in a marine terminal business, and cannot be converted into a marine terminal operator merely because it is suing in court under Alabama law for ASD. Aetna is therefore dismissed. The question of Commission jurisdiction over ASD's Bulk Plant cannot be answered absent facts concerning the types of carriers that have called there. Immunity of ASD from suit under Alabama law must yield to federal law. Also, the Eleventh Amendment does not apply to administrative proceedings against states nor to injunctive-type proceedings, and state-run terminals have been held subject to Commission jurisdiction.

(2) The fact that Aetna is suing the stevedores in courts does not mean that Aetna is seeking exculpation for ASD's own negligence. Moreover, the stevedores' rights can be protected by the courts which have authority to apply governing federal law and to consider the Commission's views as to the shipping acts.

(3) Respondent ASD has amended the indemnity provisions in its tariffs to conform to the Commission's regulations, the provisions are not ambiguous, and they can be read reasonably so as not to authorize exculpation. So can related tariff and rental agreement provisions.

(4) ASD's tariff provisions requiring stevedores to take out insurance are ambiguous and could be and apparently are being construed by Aetna to require indemnification without regard to ASD's own possible negligence, in violation of the Commission's decisions. ASD's tariffs therefore need amending and the courts should be so advised.

Douglas L. Brown, M. Kathleen Miller, and John W. McConnell, Jr., for complainants in No. 87-13.
Joe E. Basenberg and Brian P. McCarthy for complainants in No. 87-17.
G. Sage Lyons, Stephen D. Springer, and Edward J. Sheppard for respondent Alabama State Docks Department.
Michael Gillion and David A. Hamby, Jr., for respondent Aetna Casualty & Surety Co.

INITIAL DECISION[1] OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE

These administrative proceedings involve two complaints which were filed by four stevedoring companies and their insurers against respondent Alabama State Docks Department (ASD), a marine terminal operator,

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

and ASD's insurer, Aetna Casualty and Surety Company. In these complaints, complainants are alleging that respondent ASD and its insurer, Aetna, are violating section 17 of the Shipping Act, 1916, 46 U.S.C. app. sec. 816, and sections 10(d)(1) and 10(b)(12) of the Shipping Act of 1984, 46 U.S.C. app. secs. 1709(d)(1) and 1709(b)(12), by attempting to obtain indemnification from the stevedoring companies and their insurers pursuant to certain tariff provisions and other documents, which indemnification would allegedly relieve ASD from liability for ASD's own negligence. Complainants allege that such practices would subject them to undue or unreasonable prejudice or disadvantage in violation of section 10(b)(12) of the 1984 Act and constitute unjust and unreasonable practices in violation of sections 10(d)(1) of the 1984 Act and section 17 of the 1916 Act.

As often has happened in cases of this type, the two complaints had their origin in four alleged accidents to longshoremen employed by the four stevedoring companies while they were working on or near the premises of ASD. These four longshoremen, Messrs. Johnnie Drakes, Thomas P. Fleeton, Sylvester Pettway, and David Turk, were allegedly injured on December 7, 1983, August 27, 1984, September 29, 1985, and August 13, 1985. The four brought suit in a state court in Alabama against ASD's insurer, Aetna, seeking monetary recovery for their injuries. (One suit involving plaintiff Turk was later removed to Federal Court.) In turn, Aetna, which was sued under an Alabama "direct-action" statute, sued the four stevedoring companies by means of third-party complaints filed under state and federal rule 14 regarding impleading. These third-party complaints were filed by Aetna in the courts on April 6, 1987, in the Drakes case; on April 10, 1987, in the

Fleeton case; on December 23, 1986, in the Pettway case; and on August 13, 1986, in the Turk case. Aetna's filing of these third-party complaints in the courts triggered the filing of the two complaints with the Commission. The first complaint (No. 87-13) was filed on June 1, 1987, by three stevedoring companies (Pate, Ryan-Walsh, and Murray) and their insurers, as regards the Drakes, Fleeton, and Pettway litigation. The second complaint (No. 87-17) was filed on August 10, 1987, by the fourth stevedoring Company (A&G) and its insurer as regards the Turk litigation. On September 3, 1987, the three stevedoring companies and their insurers filed an amended complaint in No. 87-13, deleting reference to another longshoreman who had allegedly been injured and was employed by Pate, Mr. Jasper Agee, and to the insurer of ASD at the time of the alleged accident, the Home Insurance Company, after the parties involved in that particular litigation reached settlement.[2]

The four stevedoring companies (Pate, Ryan-Walsh, Murray, and A&G), who have filed complaints in these two administrative proceedings, are therefore being sued in state and federal court by Aetna and are, in effect, asking this Commission to stop Aetna's suits in the courts against them on the ground that Aetna is asserting unlawful, invalid, and unreasonable indemnification provisions published in ASD's terminal tariffs and in a written equipment rental agreement which, it is contended, renters of ASD's cranes must sign before they are allowed to

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[2] See letter addressed to me, received July 17, 1987, from counsel to Home Insurance Company. As I discuss later in the decision, there are additional suits or activities in which Aetna is suing or otherwise proceeding against the stevedores' insurance companies, asserting certain alleged rights under the contracts of insurance between the stevedores and their insurers, in which ASD is presumably named as an insured under ASD's tariff requirements.

work with the cranes on ASD's premises. The specific items which the complainants claim to be unlawful in ASD's Tariff No. 1-C are Item 108 (Indemnity), Item 116 (Insurance), and Item 106 (Consent); and in ASD's Tariff No. 11, Item 160 (Indemnity), Item 150 (Insurance), and Item 140 (Consent). Complainants allege that these various tariff items and the relevant portion of the equipment rental agreement are unreasonable and unjust and subject complainants to undue and unreasonable prejudice and disadvantage because, it is alleged, they allow ASD, through its statutory surrogate, Aetna, to have indemnity for ASD's own negligence. Furthermore, complainants allege that they must consent to these tariff provisions before being allowed to operate at ASD's facilities and that they are being injured because they must bear the cost of defending against Aetna in the lawsuits.

Specifically, complainants ask for relief in the form of seven categories of orders, namely, that an order be issued by the Commission (1) declaring that Aetna stands in ASD's shoes and is a proper party subject to the Commission's jurisdiction; (2) declaring the indemnity and insurance provisions of ASD's tariffs and related provisions of ASD's equipment rental agreement to be unlawful and, in the future, to be null and void; (3) requiring ASD to cease and desist from implementing these allegedly unlawful provisions and from implementing any unlawful practices in this context; (4) requiring ASD to amend its tariffs to remove the provisions in question; (5) requiring ASD to put in force lawful and reasonable practices; (6) requiring ASD to pay complainants as reparations a sum equal to the costs of defense in the lawsuits mentioned above, with interest and attorney's fees in these proceedings; and (7) such other relief as the Commission deems proper.

The Summary Judgment Procedure

Because of the pendency of the four related lawsuits in the state and federal court in Alabama and a variety of issues and affirmative defenses which had been raised in the complaints and answers thereto in the Commission cases, I convened a prehearing conference on July 31, 1987 (See Notice of Prehearing Conference and Agenda, July 2, 1987), to identify and narrow the issues to be determined by the Commission as opposed to issues for the courts, i.e., to avoid duplication of trials and findings of fact. Attention was to be given to the problem of the status of respondent Aetna, an insurance company, in terms of jurisdiction and Aetna's relationship with the marine terminal operator, ASD, in the same context. In addition, there were issues to be discussed concerning respondent ASD's claim that its bulk facility plant associated with its Tariff No. 11 was not within the Commission's jurisdiction, that ASD is immune from suit under Alabama law, and respondent Aetna's defense that application of the 1916 or 1984 Shipping Acts against Aetna's lawsuits would violate the savings provision of the 1984 Act (section 20(e)), that ASD's tariffs should be exempted from regulation by the Commission, and, finally, ASD's claim that its tariffs had been amended on May 25, 1982, so as to remove any exculpation of ASD from ASD's own negligence.

As a result of the discussion that occurred at the prehearing conference, it was decided that the issues to be determined by the Commission as opposed to those before the courts could probably be resolved on the basis of stipulated facts and a decision in the nature of summary judgment, i.e., judgment on a record free from genuine

dispute of material facts as far as the particular shipping-act issues were concerned. It was also apparent that the Commission's decision should be limited to shipping-act issues and that the courts would decide the questions of negligence surrounding the alleged accidents to the four longshoremen named above. In this regard, I instructed counsel for complainants to seek to obtain from the courts written requests or referrals to the Commission by the courts, specifying the matters which the courts wished the Commission to determine for the court's guidance or consideration. (See Notice of Rulings Made at Prehearing Conference, August 5, 1987, pp. 2-3; transcript of prehearing conference, July 31, 1987.)[3] A number of other matters were discussed regarding an amendment to the complaint in No. 87-13 (to reflect settlement in the Home Insurance Company litigation mentioned earlier) and possible limited discovery. Following these rulings, A&G Stevedores of Alabama, an

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[3] I have not still seen any written requests or referrals from the courts as regards the four relevant lawsuits pending before them. However, complainants in No. 87-13 state that "[f]our of the lawsuits have been stayed pending the determination by the Commission as to the lawfulness of the provisions of the Tariffs and Rental Agreement for the guidance of those courts." (See No. 87-13 Complainants' Brief in Support of Motion for Summary Judgment, etc., October 8, 1987, at page 7.) The decision issued herein is confined to Shipping Act issues and does not deal with questions of negligence or responsibility for the alleged injuries to the four longshoremen or other non-Shipping Act issues before the courts. Such decisions have been traditionally issued by the Commission in previous cases in which courts have referred matters to the Commission under doctrines of primary jurisdiction. See cases cited in the Notice of Prehearing Conference, July 2, 1987, at page 3 n. 1. See also CGM/ICT v. Maduro, 23 SRR 1495, 1501 n. 11 (ALJ 1986); United States Lines, Inc. v. Maryland Port Administration, 20 SRR 646, 647 (1980). Sometimes, at the request of litigating parties, even without a request from the courts, the Commission will issue a declaratory order to aid the court and guide the industry. See Docket No. 87-12, In the Matter of Maximum Potential Liability, etc., October 9, 1987.

intervener in No. 87-13, filed its complaint in No. 87-17, which complaint was consolidated with that in No. 87-13 on August 26, 1987, certain discovery rulings were issued on August 26 and September 7, 1987, and thereafter the parties filed their motions, supporting briefs and exhibits asking for summary judgment, for dismissal, or for orders striking certain defenses.

Under the procedure described above, on October 8, 1987, the parties filed various pleadings with supporting materials seeking various rulings. Respondent Aetna filed a motion for summary judgment. Respondent ASD filed a motion for dismissal of the complaint, or, in the alternative, for summary judgment. Complainants in No. 87-13 (Pate, Ryan-Walsh, Murray, and their insurers) filed a motion for summary judgment and motions to strike certain defenses of respondents Aetna and ASD. Complainants in No. 87-17, A&G Stevedores of Alabama, and its insurer, filed a motion for summary judgment. All parties except Aetna filed replies to these motions. All parties state that there is no genuine dispute of material fact. In support of the various motions, the parties have submitted a number of documents, most of which appear to be stipulated or not subject to dispute. The bulk of this evidentiary material consists of a joint stipulation of facts consisting of 18 pages and 17 exhibits attached thereto, consisting of the Alabama "direct-action" law, Aetna insurance policies with ASD, pleadings filed in the lawsuits in the Alabama and Federal courts, and the ASD Rental Equipment and Machinery Rental Agreement. In addition to the foregoing materials, the parties have submitted affidavits and proposals of one type or another which are not entirely free of dispute. However, I find that there is a sufficient undisputed factual record on which to base

this decision as to most issues, and, even where there is some dispute, a decision can be rendered under applicable principles of law, as I discuss below.[4]

Contentions of the Parties

Respondent Aetna moves for summary judgment. Aetna's two main arguments are that, in effect, it is an insurance company, the Federal Maritime Commission does not have jurisdiction over it, and Aetna is not seeking indemnification for the negligence of its insured, ASD, in the various court suits. Aetna argues that it is not a successor or assignee of ASD and is not therefore subject to the 1916 Act, which in an early section (section 2(d), 46 U.S.C. app. sec. 803), states that the provisions of the 1916 Act apply to "receivers and trustees of all persons to whom the Act applies, and to the successors or assignees of such persons." Furthermore, argues Aetna, this particular "successors-or-assignees" provision of the 1916 Act was not carried forward into the 1984 Act. Aetna also argues that it incurs no liability under the shipping acts because of the Alabama "direct-action" statute or because

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[4] The other materials consist of a proposed stipulation of facts ad affidavit of Mr. John T. Murray III, Vice-President, Treasurer, and Operations Manager of complainant Murray Stevedoring Co.; an Offer of Proof of Facts with supporting affidavit of Mr. George Houston, East Gulf Manager of complainant A&G, plus a deposition of Mr. Allen McKenzie, Superintendent of ASD's terminal railroad, a copy of a court pleading and one of ASD's equipment rental agreements, all submitted by complainant A&G; an affidavit of Mr. E. G. Browning, ASD's General Manager, Market Department, and copy of ASD's tariff items, rental agreement, and description of ASD's bulk plant facility, all submitted by respondent ASD. In their final pleading, No. 87-13 complainants filed three more affidavits, one by Mr. Murray, one by Mr. Robert J. Pate, Pate's Vice-President, and one by Mr. William J. Colley, Ryan-Walsh's Vice-President, Finance.

of its insurance contract with ASD, and that it does not stand in the shoes of ASD for all purposes merely because of the "direct-action" statute. As to the claim that Aetna is seeking exculpation from liability for ASD's own negligence, Aetna argues that the ASD tariff has been amended long ago to remove exculpation, that Aetna is suing the stevedores by means of its third-party complaints in the courts in which it is alleging that the stevedores were negligent and breached their warranties, that both the Alabama Supreme Court in a related case involving another injured longshoreman and a state court judge in one of the four suits related to the two complaints before the Commission (the Turk case) have found that these third-party complaints filed by Aetna against the particular stevedores are not suits seeking exculpation from Aetna's own negligence and, in the Turk case, the state judge held that the particular provision in ASD's rental agreement would not allow indemnification for Aetna's (presumably through ASD's) own negligence, but that the indemnification provision would permit Aetna to be indemnified for the negligence of the stevedore-company indemnitor under ASD's equipment rental agreement.

Respondent ASD asks for dismissal of the complaint or for summary judgment. ASD contends that the items in its two tariffs relating to indemnity were amended as long ago as May 25, 1982, to provide that ASD could not be indemnified for ASD's own negligence and that the equipment rental agreement which ASD requires users to sign is expressly subordinate to the tariff and therefore cannot on its own operate as an exculpatory provision. Furthermore, in practice, as ASD's official, Mr. Browning, swears in his affidavit, ASD has not sought indemnification when ASD has been negligent. ASD also argues that one of the

alleged accidents to a longshoreman (Mr. Pettway) occurred on ASD's bulk plant which lies outside the jurisdiction of the Commission because common carriers do not call at that plant, and it is not the law that everything ASD does must be regulated merely because part of its operations are subject to the Commission's jurisdiction. ASD argues further that it is immune from suit according to principles of sovereign immunity under Alabama law and under the Eleventh Amendment to the Constitution of the United States. Finally, ASD argues that the stevedores' claims for reparations are premature because the liability of the stevedores has not yet been established and are improper as a matter of law for other reasons.

Complainants in No. 87-13 (Pate, Ryan-Walsh, Murray, and their insurers) move for summary judgment and to have certain defenses of respondents Aetna and ASD stricken. These complainants contend that the principal issue before the Commission is whether ASD's tariff provisions and rental agreement, as regards indemnification, are unlawful and that the question is mainly one of tariff interpretation. They argue that the Commission has invalidated exculpatory provisions in terminal tariffs and that even though ASD amended its tariffs on May 25, 1982, the tariff provisions are still ambiguous and could allow ASD to recover indemnity against users of ASD's facilities for portions of the damage resulting from ASD's own negligence, i.e., ASD could recover from a negligent stevedore or other users even if ASD was partially negligent. It is argued that such provisions are unlawful and must be amended. The rental agreement, they also argue, is ambiguous and unlawful and it not attached to the tariff or made a part thereof, contrary to Commission regulations. Furthermore, the waiver of claims and waiver of

subrogation provisions in Items 108 and 160 of ASD's tariffs are unlawful, argue complainants. These complainants ask for cease-and-desist orders, orders requiring tariff and rental-agreement amendments, and orders that ASD observe reasonable practices.[5]

These complainants also ask that certain defenses raised by respondents ASD and Aetna be stricken. Thus they argue that the ASD bulk plant is subject to Commission regulation because, they say, ASD is holding out to any carrier at the plant, that ASD is not immune from suit because it is engaging in interstate commerce, and that the complaints are not time-barred because of continuing violations. As for Aetna's defenses, these complainants contend that Aetna stands in the shoes of ASD under the Alabama "direct-action" statute, that Aetna is suing the stevedores in the courts, asserting rights derived from ASD's tariffs, and that it would be unjust and inequitable to allow Aetna to assert ASD's rights in the courts but avoid the Commission's jurisdiction. Furthermore, they argue, Aetna's use of the savings provision in the 1984 Act (section 20(e)) is improper in these complaint proceedings because that provision applies only to protect lawsuits, not administrative proceedings, and, finally, Aetna's defense that ASD tariffs should be exempted from regulation would apply only to future exemption, if exemption were to be granted.

The complainants in No. 87-17 (A&G and its insurer) make arguments which overlap many of those made by the other complainants. Thus, these complainants also argue that ASD's tariff and rental-agreement

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[5] These complainants had also originally asked for reparations, consisting of costs of defending against Aetna's third-party complaints in the courts and attorney's fees. However, as I discuss later, they amended their complaint and deleted the prayer for reparations.

provisions are still unlawful because they could allow ASD to be indemnified for ASD's own negligence in whole or in part, and the users receive no quid pro quo in return for indemnifying a negligent ASD. Furthermore, these complainants argue, Aetna's third-party complaints in the courts show that ASD and its insurer, Aetna, use the indemnity provisions in the tariffs in an attempt to exculpate without regard to negligence. These complainants cite a number of Commission decisions in which the Commission has invalidated exculpatory tariff provisions of regulated marine terminals, which terminals, it is argued, are public and in a position to create unreasonable hardship on persons using their facilities. These complainants also contend that stevedores are forced to consent to tariff provisions and that the tariff is not negotiable although the users receive no concomitant concessions from ASD. These complainants also contend that waiver of claims and waiver of subrogation rights, as required by ASD's tariff, are unlawful, that there is an ambiguity in ASD's tariffs, as shown by reading the rental agreement with the tariff provisions regarding indemnification, and that the very ambiguity is sufficient to constitute unlawfulness and to require an order against their enforcement. Finally, it is argued that ASD's tariff provisions (Item 116 in Tariff No. 1-C and Item 150 in Tariff No. 11), requiring stevedores to take out insurance naming ASD as well as the stevedores as the insured and containing an endorsement insuring the stevedore's indemnity, are unlawful, as was held by the Commission in a previous decision.

DISCUSSION AND CONCLUSIONS

Applicable Principles of Summary Judgment Procedures

The summary-judgment procedure, which the parties believe can be followed in these proceedings, is based on the premise that the necessary facts to a decision are not subject to dispute and that the moving party is entitled as a matter of law to a favorable judgment based on the undisputed facts. The procedure can be very useful in screening out invalid claims or defenses and in avoiding unnecessary trials. See discussion in 10 Wright, Miller, and Kane, Federal Practice and Procedure, sec. 2712, at 567. However, as regards both motions for summary judgment and for dismissal, courts construe them in the light most favorable to the non-moving party and, in case of doubt, the motions are denied. That is because courts are careful not to deprive a party of the opportunity to develop a case or defense at a full trial or hearing.

I have discussed the principles governing motions seeking dismissal of complaints or summary judgment at some length in a previous decision. (See Special Docket No. 1496, Application of Leslie Enterprises, Inc. for International Trade, 24 SRR 146, 152-153 (I.D., F.M.C. notice of finality, June 8, 1987).) As the discussion in the cited case and the many cases cited therein disclose, despite the need to exercise care before issuing summary-type rulings and constructions in favor of parties opposing summary rulings, courts will grant such rulings absent genuine disputes of material fact and in cases in which, as a matter of law, the non-moving party would not have a valid claim or defense. In the case of motions seeking to dismiss complaints, the courts have

stated many times that a complaint should not be dismissed unless "it appears beyond doubt" or "it is clear" that the relief requested could not be granted under any "set of facts" that could be proved consistent with the allegations. See Application of Leslie, cited above, 24 SRR at 152. Nevertheless, a complainant is not entitled to go forward in search of evidence in all cases. The complaint must still make out a valid claim under law for which relief can be granted, and not every claim, even if true, constitutes a violation of law or otherwise justifies relief. Application of Leslie, cited above, 24 SRR at 153, and cases cited therein.

When materials are submitted in addition to pleadings, as in the instant case, motions for dismissal must be treated as motions for summary judgment. Id. As with motions for dismissal, summary-judgment motions are construed against the moving party in case of doubt, and, of course, parties moving for summary judgment must show an absence of dispute of material facts. Id. See also Nepera Chemical, Inc. v. Sea-Land Service, Inc., 794 F.2d 688, 698-699 (D.C. Cir. 1986).

In three recent decisions of the Supreme Court, it has become clear that the summary judgment procedure can be used to terminate cases in which plaintiffs' cases are fatally defective as matters of law. What the Court appears to be doing is to encourage trial judges to make sure that parties do not undergo useless, futile trials which have no chance of success for plaintiffs because of fatal defects in plaintiffs' legal theories or because essential elements in plaintiffs' cases are missing. The three cases are Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp., et al., 475 U.S.____, 89 L.Ed 2d 538 (1986); Celotex Corp. v. Catrett 477 U.S.____, 91 L.Ed 2d (1986); and Anderson v. Liberty

Lobby, Inc., 477 U.S.____, 91 L.Ed 2d 202 (1986). (These cases and others are discussed briefly in Application of Leslie, cited above, 24 SRR at 153.)

With the above background, I now turn to resolution of the specific issues. It should be borne in mind, however, that the parties have mainly agreed upon the material facts and argue primarily about the legal conclusions to be drawn from such facts. Thus, to some extent, the requirement that I construe factual doubts against the moving parties and resolve them in favor of going to trial has less importance.

The Issues

The several issues raised by the parties group themselves in three broad categories: (1) those pertaining to the Commission's jurisdiction; (2) those pertaining to the question whether respondents are engaging in unlawful exculpatory practices, in fact; and (3) those pertaining to the question whether the subject tariffs and rental agreement are unlawful on their faces. In this regard, the main jurisdictional argument is made by respondent Aetna, which, as noted earlier, is claiming that it is, in effect, an insurance company and not a marine terminal operator, and that its assertion of the indemnity provisions in the tariff of an acknowledged marine terminal operator (except for a bulk facility), ASD, does not convert Aetna into a regulated terminal operator. Another jurisdictional argument is made by ASD, which contends that its bulk plant facility does not fall within the scope of Commission jurisdiction because ASD does not, in practice, serve common carrier vessels at that plant.

Although there is authority to the effect that jurisdictional questions need not be decided if there is no case on the merits,[6] it is proper to decide jurisdictional issues before proceeding to questions on the merits. In the event that the Commission finds, contrary to my decision, that respondents have violated law, and the Commission wishes to consider issuing appropriate corrective orders, the Commission will have the benefit of my findings as to jurisdiction, which may avoid the necessity of a remand.

Jurisdiction Over Aetna

Aetna has moved for a summary judgment which would hold that it is not a marine terminal operator subject to the Commission's jurisdiction and has not become so merely because of its use of ASD's tariff provisions in its third-party complaints before the courts in Alabama or because of Alabama's "direct-action" statute. Complainants, on the other hand, contend that Aetna "stands in the shoes" of the acknowledged terminal operator, ASD, under Alabama law and by virtue of Aetna's asserting rights under ASD's tariff. Furthermore, complainants point to section 2(d) of the Shipping Act, 1916, 46 U.S.C. app. sec. 803, which makes that Act applicable to "the successors or assignees of such persons" who are subject to the Act. I fail to find sufficient basis to conclude that Aetna has become a regulated marine terminal operator or has otherwise become subject to the Commission's jurisdiction for its practices which gave rise to this litigation.

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[6] See Boston Shipping Association, Inc. v. F.M.C., 706 F.2d 1231, 1235-1236; 22 SRR 78, 82 (1st Cir. 1983), affirming the Commission's decision in 21 SRR 955.

I put aside for the moment the language of section 2(d) of the 1916 Act and consider the definitions of other persons subject to the Act and of marine terminal operators as set forth in section 1 of the 1916 Act (46 U.S.C. app. sec. 801) and in section 3(15) of the 1984 Act (46 U.S.C. app. sec. 1702(15)).

Section 1 of the 1916 Act defines "other person subject to this act" as follows:

> The term "other person subject to this act" means any person not included in the term "common carrier by water, in interstate commerce," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water in interstate commerce.

The definition of a "marine terminal operator" as set forth in section 3(15) of the 1984 Act is as follows:

> (15) "marine terminal operator" means a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier.

As the Commission has held several times, the definitions of terminal operators in both acts and operative substantive sections of law relating to them are essentially unchanged, the only difference being that the 1916 Act is confined to domestic ("interstate") commerce while the 1984 Act applies to foreign commerce. See Petchem, Inc. v. Canaveral Port Authority, 23 SRR 974, 981, 987 (1986), appeal pending, sub. nom. Petchem, Inc. v. F.M.C., No. 86-1288 (D.C. Cir.); CGM v. Maduro, 23 SRR 1085, 1087, 1095 (ALJ 1986); "50 Mile Container Rules", 24 SRR 411, 462, 466 (1987), appeal pending sub. nom. New York Shipping Association et al. v. F.M.C., No. 87-1370 (D.C. Cir.).

If Aetna is to be fond to be subject to the Commission's jurisdiction, therefore, it must be found to be carrying on or to be engaged in the business of furnishing terminal facilities in connection with a common carrier by water. Obviously, since Aetna is admittedly an insurance company, the question arises as to how it can be transformed into a marine terminal operator on the basis of the statutory definitions set forth above and the operative facts to which the parties have agreed.

It is basic law that an administrative agency is limited in its jurisdiction by its parent statute and that parties cannot confer jurisdiction on the agency by stipulation. Nor can an agency assert jurisdiction because it has a salutary purpose in mind. As the Commission has stated:

> . . . [W]e wish to point out that this agency's jurisdiction is as set out in statute, and we cannot, by our own act or omission enlarge or divest ourselves of that statutory jurisdiction. American Union Transport v. River Plate & Brazil Confs., 5 F.M.B. 216, 224 (1957).

See also Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726, 745-746 (1973); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-214 (1976); Austasia Intermodal Lines v. F.M.C., 580 F.2d 642, 646-647 (D.C. Cir. 1978); Potomac Passengers Association v. C & O Ry. Co., 520 F.2d 91, 95 n. 22 (D.C. Cir. 1975); Trans-Pacific Freight Conference of Japan v. FMB, 302 F.2d 875 (D.C. Cir. 1962); 2A Moore's Federal Practice, sec. 12.23 at 12-202 through 12-205.

The court's decision in Austasia Intermodal Lines, cited above, is especially significant. In that case, the Commission found that a non-vessel operating common carrier by water, whose service did not

include a vessel's calling at a port in the United States, was subject to the 1916 Act and had to file its tariffs. The court disagreed, finding that the Commission had interpreted its statutory authority incorrectly and could not regulate the carrier notwithstanding the remedial nature of the Shipping Act and the possibly salutary effects of regulation of the carrier. In this regard the court stated (580 F.2d at 646-647):

> In reversing the Commission's decision in this case, we are not unmindful of the remedial purposes of the Shipping Act to prevent discrimination in the shipping industry and to promote healthy competition among carriers. Perhaps companies which operate the type of service provided by ACE and American should be required to file tariffs reflecting the transportation rates they charge. It is not, however, the prerogative of a court or an administrative agency to expand the scope of legislation beyond what was originally intended by Congress. Under Section 1 of the Shipping Act as it now reads, and therefore under . . . the Commission's rules, the Federal Maritime Commission has exceeded its jurisdiction by requiring ACE and American to file tariffs for their intermodal transportation service between Detroit and Australia.

In view of the fact that complainants in the instant proceedings are contending that an insurance company has become subject to the Shipping Acts of 1916 and 1984 under the facts of the case, the Austasia case and a recent Supreme Court decision are especially enlightening. In Austasia, as just noted, the court held that the Commission had no jurisdiction over a company that had at least operated a common carrier service, the jurisdictional defect being that the carrier did not use vessels that called at a U.S. port while performing the carrier's service from Detroit to Australia. Yet the carrier's operations did not fall within the Shipping Act. In Board of Governors of the Federal Reserve System v. Dimension Financial Corporation et al., 474 U.S.____, 88 L.Ed 2d 691 (1986), the Supreme Court held that another agency, the

Federal Reserve Board, had exceeded its statutory authority when it redefined "bank" so as to include certain financial companies which were performing bank-like services. Thus, in the case cited, the Federal Reserve Board had responded to the fears of disruption of the regulatory scheme established by Congress and competitive advantages which were resulting from a proliferation of so-called "nonbank banks," i.e., a type of bank that offered NOW accounts similar to checking accounts and "commercial loan substitutes," such as certificates of deposit and commercial paper. The Bank Holding Company Act of 1956, the agency's authorizing statute, had defined a bank as an institution that accepts deposits as to which the depositor has "a legal right to withdraw or demand" and which "engages in the business of making commercial loans." In order to assert jurisdiction over such quasi-banks, which the Board had argued were "functionally equivalent" to banks, the Board issued regulations redefining the statutory criteria, stating that such institutions were banks if they accepted deposits which "as a matter of practice" were payable on demand and made loans other than commercial loans in certain ways. The Court held, however, that the Board's interpretation of the statutory definition and the resulting regulations were not accurate or reasonable, did not fall within commonly accepted definitions of loans, exceeded the specific statutory definitions, and impermissibly broadened the agency's jurisdiction. In commenting on the Board's redefinition of deposits, the Court stated (88 L.Ed 2d at 699):

> By the 1966 amendments to section 2(c), Congress expressly limited the Act to regulation of institutions that accept deposits that "the depositor has a legal right to withdraw on demand." . . . The Board would now define "legal right" as meaning the same as "a matter of practice." But no amount of agency expertise--however sound may be the result--can make the words "legal right" mean a right to do something "as a

> matter of practice." . . . The Board's definition of "demand deposit," therefore, is not an accurate or reasonable interpretation of section 2(c).

In commenting on the Board's arguments that regulation of the quasi-banks would serve the statute's purposes because these entities were "functionally equivalent" to banks, the Court stated (88 L.Ed 2d at 702-703):

> Rather than defining "bank" as an institution that offers the functional equivalent of banking services, however, Congress defined with specificity certain transactions that constitute banking subject to regulation. The statute may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute. (Footnote omitted.) If the Bank Holding Company Act falls short of providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the Board or the courts, to address.

Aetna, in this case, stands in contrast to the entities in the Austasia Intermodal and Dimension Financial Corporation cases, discussed above, in which those entities had been actively engaged in carrying on a common carrier and quasi-banking businesses, and had come close to falling within the respective common carrier and banking regulatory statutes. No one contends and there are absolutely no facts showing that Aetna is "engaged in the business of furnishing wharfage, dock, or other terminal facilities, etc." The contentions are that Aetna has fallen within the scope of Commission jurisdiction because it is being sued in courts under the Alabama "direct-action" statute and is asserting rights under ASD's tariff against the complainant stevedores in the courts. It is argued that Aetna therefore "stands in the shoes" of ASD and that it would be inequitable to allow Aetna to assert rights under

ASD's tariffs but avoid regulation by the Commission. I find these contentions unpersuasive.

The Alabama law, which complainants cite, is section 33-1-25 of the Alabama Code (1975). This statute authorizes the director of ASD to enter into insurance contracts, which contracts may, in his discretion, "provide for a direct right of action against the insurance carrier for the enforcement of any such claims or causes of action." (See "Exhibit 1.") This statute is one of a type that a number of states have enacted which permit an injured person to sue an insurance company directly, rather than the insured company, as the real party in interest, and they have been held to transform an insurance contract from one of indemnity to one of liability. See discussion in 44 Am Jur 2d, Insurance, sec. 1445. As complainants point out, the Alabama Supreme Court, in another case involving an injured longshoreman and a third-party complaint by its insurer (again Aetna) against a stevedore, the insurance company "stands in the shoes" of ASD and derives its rights through ASD by virtue of the "direct-action" statute. See Aetna Casualty & Surety Co. v. Cooper Stevedoring Company, 504 So. 2d 215 (1987).

The Court in the cited case, among other things, sent the case back for trial to the lower court to determine questions of negligence and found the indemnity provisions in ASD's tariff, which Aetna was asserting, to be valid and enforceable "based upon the facts in the instant case." (504 So. 2d at 217).) The Court also found it proper for Aetna to bring the suit against the stevedore company under the "direct-action" statute and that "Aetna's rights and liabilities are derivative of those of the State Docks." (504 So. 2d at 216.) I fail to see how

these holdings can transform Aetna into a regulated terminal operator under the 1916 or 1984 Acts. Quite obviously the Court was establishing Aetna's rights to assert the ASD's tariff provisions in Aetna's own right for purposes of suit in the state court under the state's "direct-action" statute. I do not, however, construe the statement that "Aetna's rights and liabilities are derivative of those of the State Docks" to mean that Aetna now assumes Shipping Act liabilities and obligations. For example, does Aetna now have to file terminal tariffs, does it have to serve common carriers and terminal customers without discrimination, etc.? Obviously this cannot be what the court meant, nor what complainants intend, and the court statement must be taken in the context of the suit and the specific arguments raised before the court.

Complainants have cited no authority for the proposition that a "direct-action" statute, which was designed to facilitate relief for injured persons by enabling them to sue insurance companies directly in state courts instead of proceeding only against the actual tortfeasor, changed federal substantive law. On the contrary, it would appear that these statutes cannot change federal law. For example, see Cushing v. Maryland Cas. Co. et al., 198 F.2d 536 (5th Cir. 1952), rehearing denied, 198 F.2d 1021 (5th Cir. 1952), a case involving five suits stemming from the alleged negligence of a bridge owner which had caused the death of five seamen working on a tugboat which had collided with the bridge. The plaintiffs had brought suit against the bridge owner and also directly against the insurer of the owner and charterer of the tug under the Louisiana "direct-action" statute. The lower court had dismissed the complaints against the insurance companies, holding that

the Louisiana statute did not apply to marine protection and indemnity insurance and would interfere with federal maritime law. The Court of Appeals, however, reversed. The Court held that the "direct-action" statute was remedial and should be construed to effectuate its "obvious purpose, which is to afford an injured person a direct action against a compensated insurer who has assumed ultimate liability." (198 F.2d at 538.) The court went on to hold that the Louisiana statute did not change the substantive admiralty law but "provides only an additional and cumulative remedy at law in the enforcement of obligations of indemnity voluntarily and lawfully assumed by the insurer." (198 F.2d at 539.) The "direct-action" statute, according to the court, "is simply a regulation by the state of insurance companies doing business within its boundaries. . . ." (Id.) Earlier in its opinion, the court had quoted from a Supreme Court decision (Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109), which indicated that states could not modify federal admiralty law but could add additional procedural remedies. (198 F.2d at 538.) See also Shockley v. Sallows, 615 F.2d 233 (5th Cir. 1980), cert. denied, 449 U.S. 838 (1980), another case under the Louisiana "direct-action" statute in which the Court held that the substantive law of the state of North Dakota would apply notwithstanding the "direct-action" statute which allowed plaintiff to bring suit in Louisiana against the insurance company.[7]

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[7] Not only does a "direct-action" statute not change substantive law but the Alabama "direct-action" statute does not even determine the scope of the insurance contract between ASD and its insurer, Aetna. In other words, the Alabama "direct-action" statute is a remedial law which authorizes ASD, which is generally immune from suits for damages, to take out insurance, in which case the insurance company may be sued. See Central Stikstof etc. v. Walsh Stevedoring Co., 380 F.2d 523, 533 (Footnote continued on following page.)

But complainants add two other arguments. First, they argue that it would be inequitable to allow a regulated terminal operator, ASD, to place insurance with a company like Aetna, to allow Aetna to assert ASD's rights under ASD's tariffs, and have Aetna avoid the Commission's regulation. Secondly, it is argued that the 1916 Act extends jurisdiction to "successors or assignees" of persons subject to that Act. I fail to find either of these two arguments persuasive as well as the preceding ones.

I have no problem with the contention that Aetna, which is asserting the rights of ASD under the ASD tariffs, is limited to the provisions of that tariff. In other words, Aetna can obtain no greater rights under the ASD tariffs than ASD would have had if ASD were suing the stevedores in the courts instead of Aetna's suing them. The obvious answer to the stevedore companies' concern that Aetna might be trying to obtain indemnification for ASD's own negligence, however, is to advise the courts, which have jurisdiction over Aetna and all the other parties, that under the Shipping Acts, exculpatory provisions in tariffs of regulated marine terminal operators are invalid so that the courts can order Aetna to cease from asserting invalid rights if Aetna is in fact, contrary to the evidence, attempting to assert such rights. The solution is not to attempt to extend Commission jurisdiction to cover an insurance company nor to order the insurance company, a litigant before the courts, to stop litigating. The Commission does not interfere with the rights of parties to present their arguments to courts even when the parties are admittedly subject to the Commission's jurisdiction. The

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[7] (Continued from preceding page.)
(5th Cir. 1967); Benefield v. Valley Barge Lines, 472 F.Supp. 314, 317 (S.D.Ala. 1979).

Commission views such an order as one which would interfere with the court's authority to determine the issues and one which would be of doubtful authority under the Commission's enabling statutes. See Stevens Shipping and Terminal Co. v. South Carolina State Ports Authority, 23 SRR 684, 688 (1985). Instead, the Commission decides the questions of lawfulness of tariff provisions under the shipping acts and presents its advice to the courts for their assistance. (Id.)

The last argument of complainants is that Aetna is a "successor" or "assignee" of a person subject to the 1916 Act under section 2(d) of that Act (46 U.S.C. app. sec. 803(d)), which states:

> (d) The provisions of this Act shall apply to receivers and trustees of all persons to whom the Act applies, and to the successors or assignees of such persons.

I am not aware that this provision of the 1916 Act has ever been asserted in the context of a regulatory proceeding before the Commission, and complainants cite no such precedent. It should be noted that the Shipping Act, 1916, was not merely a regulatory statute but was enacted in the middle of World War I when the nation faced an emergency because of the unavailability of foreign ships. Therefore, the 1916 Act was enacted, as is stated in its preamble:

> To establish a United States Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States . . .; to regulate carriers by water, etc.

Accordingly, it is not until section 14 of the 1916 Act that the regulatory provisions of that Act are encountered, and, as was noted by the Supreme Court in F.M.B. v. Isbrandtsen Co., Inc. et al., 356 U.S.

481, 510 (1958) (Frankfurter, J., dissenting), a good deal of the legislative history and most of the debates in the House and before the Senate Commerce Committee had to do with ship purchase and lease provisions, not regulation. See also Report of the Antitrust Subcommittee of the House, No. 1419, 87th Congress, 2d Session, March 12, 1962 (the "Celler Report") at pages 13 n. 43, and pages 19-20.[8]

It seems reasonable to infer that the "successors and assignees" language as well as the "receivers and trustees" language appearing in section 2(d) of the 1916 Act would have more relevance to shipbuilding and ship operations inasmuch as the language appears in the midst of other provisions of the 1916 Act having to do with ship ownership or registration and definitions of citizens of the United States and the like. The conclusion that this provision was really intended to or was primarily intended to apply to the non-regulatory provisions of the 1916 Act is reinforced by two facts. First, when the Federal Maritime Commission was established in 1961, succeeding the Federal Maritime Board, in order to have the Commission confine itself to regulation and leave promotion to the Maritime Administration, the functions associated

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[8] As the "Celler Report" briefly stated (at pages 19-20):

> The breakdown in shipping facilities during World War I produced tremendous increases in ocean freight rates. Under the Shipping Act of 1916, Government-administered fleet purchase and construction programs were established in order to cope with the wartime emergency. A five-member U.S. Shipping Board was authorized to "purchase, construct, equip, lease, charter, maintain, and operate" the necessary merchant ships. (Footnote citation omitted.) The Emergency Fleet Corporation, organized to execute this mandate, carried out an extensive shipbuilding program, and by the end of the war the Government owned a large merchant fleet, the disposition of which posed vexing problems in the ensuing years.

with section 2 of the 1916 Act were not transferred to the Commission. See Reorganization Plan No. 7 of 1961 (75 Stat. 840), section 103. The second fact is that when Congress enacted the 1984 Act, which is regulatory, it omitted the language of section 2(d). However, let us assume that the "successors of assignees" language of section 2(d) was intended to apply to the regulatory provisions of the 1916 Act. First, that would mean in the context of this case that Aetna would be subject to the 1916 Act but only insofar as the particular accident arose while the longshoreman was working on a ship involved in domestic, not foreign commerce. That is because the 1916 Act was amended so as not to apply to the foreign commerce of the United States. See section 20(b), 1984 Act, Public Law 98-237, 98 Stat. 67. That would mean that the Commission could order Aetna to cease and desist from asserting ASD's tariff provisions only in the event that a ship engaged in a domestic trade was involved. In the event that two longshoremen were injured on adjoining facilities, one working on a ship loading for a foreign destination, the other loading for a domestic destination, Aetna would be a "successor" or "assignee" subject to a Commission order in the latter case but not in the former, surely a curious result that should not lightly be imputed to Congress.

Aside from this domestic-foreign dichotomy, the question arises as to whether it is reasonable to interpret "successor" or "assignee" to mean an insurance company which is involved only because of a "direct-action" statute and a procedural rule allowing the impleading of third-party defendants in the courts. Even if Aetna's role as a litigant in the various proceedings is read to mean that Aetna has become a "successor" or "assignee," there is a doctrine in law that holds that

statutes should not be read literally if the result is absurd or anomalous. See, e.g., F.M.C. v. DeSmedt, 366 F.2d 464, 469 (2d Cir.), cert. den., 385 U.S. 974 (1966); United States v. Katz, 271 U.S. 354, 357 (1926). Thus, this doctrine would call for caution before concluding that an insurance company is to be considered to be one furnishing wharfage, dock, warehouse, etc., even for limited purposes of litigation. Furthermore, there is another doctrine of statutory construction which holds that words in a statute are to be given their normal, commonly understood meaning absent special circumstances or persuasive reasons to the contrary. See Burns v. Alcala, 420 U.S. 575, 580-581 (1975). (". . . words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary . . ."); Perrin v. United States, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.") The statute in question uses the words "successors or assignees," as seen above. These words usually refer to situations in which companies or entities continue performing functions previously performed by a predecessor or to situations in which someone receives assignment from someone else of someone else's rights, title, etc.[9] They are not normally used in connection with persons made suable by "direct-action"

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[9] The words "successors" or "successors and assigns" are often used in N.L.R.B. orders and have been interpreted to mean a "continuity of identity" between the previous and present companies or a transfer of a majority of the predecessor's work force. See, e.g., N.L.R.B. v. Bausch & Lomb, Inc., 526 F.2d 817, 824-825 (2d Cir. 1975). As Aetna contends in its brief, an assignment normally arises out of a contract between the assignor and assignee, but complainants have not shown that there is such a contract of assignment between Aetna and ASD. (Aetna's brief at 2-3, citing 6A, C.J.S., Assignments, at 593.) The insurance policies between ASD and Aetna (Exs. 2, 3) do not contain an assignment clause, (Footnote continued on following page.)

statutes or with third-party complainants such as Aetna or, for that matter, to insurance companies which may sue under the principles of subrogation. Limiting the reach of section 2(d) of the 1916 Act to true succession to a previous business or to true assignment makes sense, furthermore, because it is more reasonable to infer an intent to regulate practices of someone who inherits the business of a predecessor than to regulate a limited third-party complainant whose business has nothing to do with running a marine terminal.

To summarize, I conclude that Aetna is operating as an insurance company, and there is no evidence that respondent Aetna is "engaged in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier." On the contrary, the evidence is that Aetna has become a litigant in various lawsuits because of the Alabama "direct-action" statute and by the procedural rule of impleader, but this law and rule do not affect federal substantive regulatory law, namely, the Shipping Act of 1916 or 1984 as to the definition of a regulated marine terminal operator. Furthermore, even

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[9] (Continued from preceding page.)
assigning ASD's rights to Aetna. Instead they contain cooperation and subrogation clauses (paras. 4(c) and 7). Subrogation is not the same thing as assignment, of course. See First Nat. City Bank v. United States, 548 F.2d 928, 935-936 (Ct.Cl. 1977). Furthermore, ASD is, as far as this record shows, still operating its terminal facilities and has no "successor." In short, I have no evidence before me showing that Aetna has become ASD's "successor or assignee" as those terms are commonly understood. As noted, the Alabama Supreme Court has held that Aetna "stands in the shoes" of ASD under the Alabama "direct-action" statute for purposes of the suits. However, this does not necessarily mean that Aetna has become the "successor or assignee" of ASD within the normal meaning of those words or as used in the 1916 Act. The Alabama statute may have transferred liability from ASD to Aetna, as some courts have construed the effect of "direct-action" statutes, as noted earlier. However, as one authority has stated, ". . . while every assignment is a transfer, not every transfer is an assignment." 6 Am Jur 2d, Assignments, sec. 1, at page 186.

if it would be worthwhile to have jurisdiction over an insurance company like Aetna under the facts of this case, the Commission's authority is limited by its parent statutes, which do not include insurance companies, "direct-action" defendants or third-party complainants in lawsuits in the definition of a regulated marine terminal operator. Nor can the reference to "successors or assignees" of persons subject to the 1916 Act in section 2(d) of that Act be read to authorize regulation of Aetna. That reference appears in a non-regulatory portion of the 1916 Act and was not transferred to the Commission either in 1961 under the governing reorganization plan or in 1984 when the modern regulatory statute was enacted. Furthermore, even if it has been transferred, the normal meaning of "successors or assignees" does not apply to insurance companies who are suing and being sued in courts because of "direct-action" statutes and rules of impleader.

Accordingly, Aetna's motion for summary judgment as to jurisdiction is granted. Aetna is dismissed as a respondent in these proceedings.[10]

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[10] Aetna has also made arguments that even under the Alabama "direct-action" statute and the terms of the insurance policy with ASD, there is no direct right of action against Aetna. It is argued that the statute allows limited coverage and that the policy covers payment of damages for personal injury or death of persons or the loss of or destruction of property of others. Aetna contends that the stevedores are not persons and have suffered no loss of or destruction of property. Also, argues Aetna, complainants are asking for reparations for costs of defending against Aetna's third-party suits in the courts, but the third-party suits were filed outside the applicable time periods of the insurance policies in question. As I have found no Commission jurisdiction over Aetna, it is not necessary to discuss these arguments. Furthermore, as indicated, I have already found that the Alabama "direct-action" statute has limited significance and cannot change the substantive provisions of the Shipping Acts.

Other Jurisdictional-Type Contentions

I have spent some time on the question of the Commission's jurisdiction over Aetna because it appears to be one of first impression, and, although I find no violations of law generally, it is desirable to resolve jurisdictional questions at the outset to avoid later difficulties in case the Commission were to reverse my conclusions as to the merits of this controversy. There are additional jurisdictional-type issues which deserve resolution for the same reasons. Also, some of the arguments by respondent ASD ought to be addressed because they raise constitutional or fundamental questions regarding the status of a marine terminal operated by a state agency.

Respondent ASD, as noted earlier, argues that its Bulk Materials Handling Plant, at which occurred the alleged accident to Mr. Pettway, lies outside the Commission's jurisdiction because common-carrier ships do not call at the Plant. ASD also argues that under Alabama law and the U.S. Constitution, ASD is immune from Commission regulation, and that the claims for reparations are premature and not compensable under applicable law in any event. I disagree with ASD on the question of sovereign immunity but find some merit to the remaining arguments, especially as regards the premature nature of the stevedore companies' complaints before the Commission. As to the question whether the Commission has jurisdiction over the Bulk Plant, however, I find it inappropriate at this time to decide the question for several reasons. First, the record is sparse and undeveloped as to the question whether ASD has in fact served common carriers, although presently there is no evidence that such carriers have called at the Plant. Second,

complainants in No. 87-13 have filed a motion asking for denial of ASD's motion for summary judgment on this issue or for a postponement of decision on the issue to permit complainants to obtain relevant facts through interrogatories and depositions on the question of what types of carriers have been served at the bulk facility. Third, as my previous discussion of summary-judgment procedures indicates, I cannot grant summary judgment if there is a factual dispute as to a critical matter such as the nature of the carriers which have called at the Bulk Plant facility, and I am supposed to construe doubts in favor of non-moving parties (i.e., complainants) when respondents move for dismissal, so as not to deprive complainants of a fair opportunity to present their facts and arguments. Finally, because of my findings that respondent ASD does not publish exculpatory provisions in its Tariff No. 11, in effect at the Bulk Plant facility, and that Aetna is not seeking to have indemnification for ASD's own negligence as far as the evidence shows, it is questionable whether time should be taken in this formal proceeding to obtain all the facts rather than have the facts obtained by the Commission's staff informally or otherwise. However, if it is believed to be desirable to determine the status of the Bulk Plant facility and that this can only be done under the current legal test enunciated by the Commission, i.e., whether common carriers in fact have called at the terminal rather than whether the terminal "holds out" to serve common carriers by filing a tariff or otherwise, the Commission can remand the case to determine the types of carriers that have called at the facility. (I add, however, that on this limited record, because of the inherent bulk nature of the facility, it is more probable than not that common carriers have not called at the facility. However, the record

does not show in fact what carriers have actually called there.) Of course, if ASD were to amend its Tariff No. 11 to specify that it would not serve common carriers at the facility, as has been done in previous cases, the question of jurisdiction at the facility would be decided. See New Orleans Steamship Association v. Bunge Corp., 8 F.M.C. 687, 694 (1965); Agreement No. T-2719, 16 F.M.C. 318, 321 (1973).[11]

ASD also argues that ASD, as a state agency, is immune from suit under Alabama law and under the Eleventh Amendment to the U.S. Constitution. The first of these arguments, i.e., immunity under state law, cannot be seriously entertained by a federal agency operating under federal law. Whatever Alabama may do regarding the rights of persons to

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[11] The limited facts regarding the nature of the Bulk Plant are shown in an affidavit of Mr. E.G. Browning, ASD's General Manager, Market Development, who described the type of cargo, import ores, handled by the specialized facilities at the Plant, which is located away from ASD's general cargo facilities. Mr. Browning concludes that the nature and quantity of the bulk cargoes handled there, which are carried in full-vessel lots on chartered ships, precludes their transportation in common-carrier vessels. An information sheet with pictures appears to corroborate these views. ASD argues that there is no need to publish a disclaimer against serving common carriers in the tariff, as was done in the Bunge and Agreement No. T-2719 cases, because common carriers cannot be served at the facility. Complainants, however, argue that ASD has filed a tariff for the facility and therefore "holds out" to serve common as well as non-common carriers, and may in fact have served common carriers. The Commission does not follow the "holding out" test and does not hold that filing a tariff, even with solicitation, is enough to confer regulated status on the terminal. See Petchem, Inc. v. Canaveral Port Authority et al., 23 SRR 974, 982-983 (1986), appeal pending sub. nom. Petchem, Inc. v. F.M.C., No. 86-1288 (D.C. Cir.); Louis Dreyfus Corp. v. Plaquemines, 21 SRR 219, 224 (I.D., adopted by the Commission, 21 SRR 1172 (1982)); Prudential Lines v. Continental Grain Co., 21 SRR 1172, 1174-1175 (1981). See also Giacona v. Marubeni Oceano (Panama) Corp., 623 F.Supp. 1560, 1567 (D.C. Tex. Houston Div 1985). As the cited cases indicate, under the Commission's legal test, it is necessary to ascertain whether common-carrier vessels have in fact called at a terminal to determine its status, even if, as here, it is unlikely that they have.

sue in state courts against the sovereign state is one thing, but interposing state sovereignty against a federal statute enacted by Congress pursuant to the authority of Article 1 of the Constitution is something else. In short, the state law must give way under the Supremacy Clause of the U.S. Constitution.[12] See, e.g., Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317-319 (1981); Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985); Fry v. United States, 421 U.S. 542, 548-549 (1975). In commenting on the state-sovereignty argument in Garcia, the Supreme Court stated (469 U.S. at 548):

> . . . the sovereignty of the States is limited by the Constitution itself. A variety of sovereign powers, for example, are withdrawn from the States by Article I, sec. 10. Section 8 of the same Article works an equally sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation.

For more cases, see annotation at 83 L.Ed 2d 1163, 1182-1185 (1987).[13]

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[12] The Supremacy Clause (Article VI, cl 2) states:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land, and the judges in every State shall be bound thereby, any thing in the . . . laws of any State to the contrary notwithstanding.

[13] Complainants in No. 87-13 have argued at some length that ASD is not immune from suit even under Alabama law for a number of reasons. (See Complainants' Brief in Opposition, at 19-32.) Thus, complainants contend that although the Alabama Constitution forbids the state's being made a defendant in "any court of law or equity," Commission proceedings are not suits in law or equity but administrative proceedings, that (Footnote continued on following page.)

The above discussion would be relevant if the 1984 and 1916 Shipping Acts are held to apply to the state-operated marine terminals, i.e., if Congress, exercising its powers under the Commerce Clause of the U.S. Constitution (Article I, sec. 8 cl 3) had intended to apply these regulatory laws to states when they operated terminals. However, argues ASD, under the current test employed by the Supreme Court, ASD is immune from Commission regulation or at least certain aspects of it, by virtue of the Eleventh Amendment to the U.S. Constitution. Thus, ASD argues that "ASD, as a state agency, is immune under the Eleventh Amendment from a claim brought by a private litigant under either Shipping Act, because neither act expressly abrogates immunity." (Motion of ASD to Dismiss, at 18.) ASD recognizes that such immunity may not preclude suits by the Commission itself to enforce these acts and may only immunize ASD from suits for damages by private litigants. However, ASD argues that the current test employed by the Supreme Court in its decision in Welch v. State Dept. of Highways and Transportation, 483 U.S.____, 107 S.Ct. 2941, 97 L.Ed 2d 389 (1987), confirms that a prosecuting party must show that the state's Eleventh Amendment immunity has been abrogated by Congress in unmistakably clear language in the

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[13] (Continued from preceding page.)
under certain decisions of the Alabama Supreme Court, the state would not be considered a party to these proceedings, and that the state waived its sovereign immunity as to any matters under the Commerce Clause of the U.S. Constitution when it was admitted to the Union and when it authorized and created ASD. In effect, complainants argue that, under Alabama law, its agents such as ASD can be sued and forced to observe federal or state law, among other things. In view of my conclusions that state sovereignty under state law, whatever it is, must give way before federal law under the Supremacy Clause, it is not necessary for me to discuss these additional arguments. Suffice it to say that they appear to have merit and would provide additional reasons to find no sovereign immunity for ASD even under Alabama law, if necessary to utilize such additional arguments.

particular state itself. Such language, however, is absent from both shipping acts. Therefore, an earlier decision of the Court holding that the 1916 Act applied to state-operated marine terminals cannot be read to authorize private suits against such terminals, so ASD argues.

Again, it is not necessary to engage in a lengthy discussion of the law relating to the Eleventh Amendment and to the reasons why I do not agree that ASD is immune from a complaint brought before an administrative agency. Complainants in both of these proceedings have spent some time discussing case law, refuting ASD, and ASD has cited several of the same cases. (See No. 87-13 Complainants' Brief in Opposition, at 10-32; No. 87-17 Complainants' Response to ASD, at 7-11; ASD's Motion to Dismiss, at 14-20.) Lengthy discussion of the principles applicable to the Eleventh Amendment and its many nuances is not warranted, however, because, as I have stated earlier, I do not find that ASD has violated either Shipping Act generally. However, a brief explanation of my disagreement with ASD may be helpful to the Commission if it disagrees with my findings on the merits.

The answers to ASD's arguments are that the Eleventh Amendment is a limitation on the power of the federal judiciary and does not mention administrative agencies, that the Welch case and others like it interpret various federal statutes but the Shipping Act, 1916, has long ago been found by the Supreme Court to apply to state-operated terminals, and that even if the Supreme Court were to overturn or modify that decision, the Eleventh Amendment does not preclude suits by the United States or suits in the nature of injunctions or orders to comply with law as opposed to suits by private parties seeking money damages from states in federal courts. Finally, because the Eleventh Amendment

is an express limitation on the jurisdiction of the federal courts, it would not be proper for an administrative agency to determine the scope of a federal court's jurisdiction. It is rather for the federal courts to determine the extent of their own jurisdiction.

Very briefly, then, the Eleventh Amendment states:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

The Amendment is therefore an express limitation on the jurisdiction of the federal courts and says nothing about administrative agencies, nor, for that matter, does it even preclude a suit by a citizen of one state against another state in the courts of the first state. See Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 119-120 (1984) (an express limitation of the judicial power of the U.S.); Ellis Fischel State Cancer Hospital v. Marshall, 629 F.2d 563, 567 (8th Cir. 1980), cert. den., 450 U.S. 1040 (1981) (administrative proceeding not barred by the Amendment); Nevada v. Hall, 440 U.S. 410 (1979) (private citizen can sue state of Nevada in California court).

It is true that in the Welch case, cited above, a case in which a private citizen sued a state for damages, the Court held that the state enjoyed immunity from such a suit because the particular statutes under which the suit was brought did not expressly make the state liable to such suit. The Court had been developing such a test in several

previous cases under other statutes.[14] The case arose under the Jones Act and the Federal Employers' Liability Act, which, though remedial, were found not to contain the requisite expression of congressional intent to abrogate state immunity under the Eleventh Amendment in the statutes themselves. However, none of the various decisions of the Supreme Court or lower courts has applied this test to either of the Shipping Acts. The last time the Supreme Court interpreted the 1916 Act as regards the extent of Commission jurisdiction over state-run marine terminal operators, the Court found ample evidence from the legislative history that Congress intended to have the 1916 Act apply to public owners of wharves and piers. See California v. United States, 320 U.S. 577, 585-586 (1944); see also Perry's Crane Service v. Port of Houston Authority, 16 SRR 1459, 1480-1482 (I.D., adopted in relevant part, 19 F.M.C. 548 (1977)).

ASD argues that the California decision may have been overruled by the Court in Welch, or, if not, that the California decision involved enforcement of an order fixing minimum terminal charges which had been issued by the Commission following a Commission-instituted investigation. Because Welch involved a private suit for damages against a state, unlike California v. U.S., one cannot say that the Court implicitly overruled its holding in California v. U.S. that the 1916 Act was intended to apply to state-run terminals. The real

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[14] In Welch, 97 L.Ed 2d at 398, the Court referred to three previous decisions under different statutes in which the Court had determined whether states' immunity under the Eleventh Amendment had been abrogated by looking for express language in the statutes to that effect.

question is whether the Supreme Court would hold today that the 1916 or 1984 Act would authorize a private citizen to sue in a federal court to enforce an order of the Federal Maritime Commission directing a state to pay money damages to the private party.[15] In other words, would the Court apply its modern test of requiring express abrogation of a state's immunity under the Eleventh Amendment, as enunciated in Welch and similar cases, to the 1916 or 1984 Acts, and hold that the federal courts have no jurisdiction to enforce such orders against states, notwithstanding the 1944 decision holding that Congress intended to apply the 1916 Act to the states, the creation of private rights of reparations in the 1916 Act, and the enhancement of those rights in the 1984 Act.

Although, as I discuss below, I find no violations of law by ASD generally and no basis for reparations now, in the event the Commission reverses my findings and wishes to consider issuing orders for reparations, my conclusions as to the propriety of issuing such orders would be relevant. I conclude that the Eleventh Amendment, at best, may preclude a federal court from enforcing an order of reparations issued

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[15] The Court, in Welch, specifically recognized that in an earlier decision (California v. Taylor, 353 U.S. 553, n. 16 (1957)) in which the Court had found that the Railway Labor Act applied to state-owned railroads engaged in interstate commerce, the question whether the Eleventh Amendment would bar enforcement in federal courts of any award by the National Railroad Adjustment Board was not before the Court. See Welch, cited above, 97 L.Ed 2d at 398 n. 7. Interestingly, the Court in California v. Taylor had cited California v. U.S. in holding that the federal Act applied to the state-owned railroad. Obviously the question whether a regulatory statute applies to a state is not necessarily the same question as whether a private party can obtain enforcement of orders for money damages against a state in a federal court notwithstanding the Eleventh Amendment.

by the Commission against a state in favor of a private complainant, but that no court has yet decided the question. Furthermore, because of the peculiar history of the 1916 Act, the Court's decision in California v. U.S., cited above, and the reparations rights first established in the 1916 Act, no one can predict how a court would decide the issue. Moreover, because the issue concerns the extent of the jurisdiction of federal courts, it is not appropriate for a regulatory agency to decide the question for the courts. Absent a court decision on the issue telling the Commission that the federal courts have no jurisdiction to enforce Commission orders against states because of the Eleventh Amendment, I see no reason for the Commission to presume that the courts have no such jurisdiction and no reason to refuse to consider issuing reparations orders against states in the proper case because of such a presumption. As to the question whether the states enjoy immunity under the Eleventh Amendment from Commission regulation of state-run terminals in cases other than those involving private suits in federal courts seeking payment of reparations, I do not think that there can be reasonable doubt in view of California v. U.S., cited above, and the essential limitation of the Eleventh Amendment to cases in federal courts in which private parties seek money damages from states.[16]

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[16] For a collection of cases and discussion showing that the Eleventh Amendment gives states no immunity in a variety of situations, see Federal Judicial Power--Eleventh Amendment, annotation contained in 50 L.Ed 2d 928. Note how the Amendment does not bar suits in federal courts by the United States nor bar suits against cities or towns or other entities that are not arms of the states, nor does it bar suits seeking prospective relief against states as opposed to past money damages. See also Welch, cited above, 97 L.Ed 2d at 406, and the discussion in Quern v. Jordan, 440 U.S. 332, 337 (1979), distinguishing between cases involving retrospective relief and money damages and those involving prospective, injunctive-type relief, the latter not barred by the Amendment. Complainants also argue that ASD has waived its immunity (Footnote continued on following page.)

Finally, ASD contends that the complainant stevedores' claims for reparations against ASD including indemnification or contribution from ASD and payment by ASD of the stevedores' costs of their defenses against Aetna's third-party complaints in the courts are either premature or are not compensable in any event under the Shipping Acts. Complainants in No. 87-13 assert that the issue is moot because they have amended their complaint so as to remove their prayers for reparations, although claiming that they are still suffering injuries to the extent of the costs of defending against Aetna's claims in the courts. (See No. 87-13 Complainants' Brief in Opposition, at 48; Second Amended Complaint, October 29, 1987.) Complainants in No. 87-13 have apparently withdrawn their request for reparations because of concern that the Commission may not have jurisdiction over ASD in the matter of money-damage claims because of the Eleventh Amendment, as discussed earlier. However, complainants in No. 87-17 still request reparations in their complaint.

Although I do not agree that it was necessary for the No. 87-13 complainants to drop their claims for reparations in order to preserve Commission jurisdiction over ASD because, as discussed earlier, the

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[16] (Continued from preceding page.)
because it engages in a regulated activity, citing Parden v. Terminal Railway of Ala. Docks Dept., 377 U.S. 184 (1964), which they claim to be still good law on the point. I would be very reluctant to agree with this contention in view of the Court's disposition of the Parden case in Welch and other recent decisions in which the Court has held that a state's waiver of immunity must be shown by clear, explicit language and not by construing the circumstances. See Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238 n. 1 (1985); Welch, cited above, 97 L.Ed 2d at 396, 398-399. Certainly the Fifth Circuit Court of Appeals does not agree that a state has lost its immunity merely by entering into a federally regulated business. See Intercoastal Transportation, Inc. v. Decatur County, Ga., 482 F.2d 361, 365 (5th Cir. 1973); Bennefield v. Valley Barge Lines, 472 F.Supp. 314, 316-317 (S.D.Ala. 1979).

question of jurisdiction under the Eleventh Amendment is one for the courts to determine because it directly affects the courts', not the Commission's jurisdiction. I agree with ASD that the question is premature because there has as yet not been a determination as to who was negligent in the various accidents to the longshoremen, and, as I discuss below, there is no evidence that ASD or Aetna is attempting to have or has succeeded in having the stevedores directly indemnify for ASD's own negligence. Therefore, it would be speculative as well as premature to attempt to resolve questions as to reparations compensable under the Shipping Acts at this time, and, even if the Commission were to disagree with my resolution of the questions of violations of law, it would be necessary to develop evidence on the extent of the alleged injuries as well as hear arguments on the questions of law as to what injuries are compensable, especially since complainants in No. 87-13 have withdrawn their requests for reparations and are no longer submitting arguments on the subject.

Issues Relating to the Merits of the Complaints

The non-jurisdictional issues concern the question whether respondents have been engaging in practices which have subjected or are subjecting complainants to undue or unreasonable prejudice or disadvantage, in violation of sections 10(b)(12) of the 1984 Act (as extended by section 10(d)(3) to marine terminal operators) or which practices are unjust and unreasonable in connection with the receiving, handling, storing, or delivering of property, in violation of section 10(d)(1) of the 1984 Act or section 17 of the 1916 Act. The second issue is whether

ASD's tariffs and rental-agreement provisions violate any of these laws on their faces because of ambiguities.

As I discussed earlier, under the law applicable to motions for summary judgment or for dismissal of complaints, it is proper to construe the facts most favorably to the non-moving party to make sure that the non-moving party is not deprived of its rights to develop its case at trial on a full record. However, as the cases I cited earlier indicate, the Supreme Court has made clear that a court should not go forward into trial if there is no viable case under applicable principles of law or because critical evidence or elements of the case are missing.

In this case respondents Aetna and ASD are seeking summary judgment or an order of dismissal of the complaints, contending that there is no evidence that either of them is seeking exculpation for ASD's own negligence. They point out the fact that in the various court suits Aetna is alleging negligence and breach of warranty by the stevedoring companies. Also, ASD contends that it has never in practice sought to exculpate itself from the consequences of its own negligence even before it amended its tariffs on May 25, 1982, to conform to the Commission's holding that exculpatory provisions in terminal tariffs are unlawful. ASD furnishes an affidavit of Mr. Browning, its General Manager, Market Development, who states that he investigated ASD's practices under its tariffs to determine whether ASD had ever sought to protect itself from its own negligence, and found no such attempts. (See Browning Affidavit, para. 8.)[17] Aetna argues, furthermore, that in one of the

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[17] The No. 87-17 complainants point out, however, that ASD may never have enforced its tariff provisions to protect itself from its own
(Footnote continued on following page.)

four lawsuits (the Turk case pending before Judge Johnstone in state court), Judge Johnstone has already ruled that the indemnity agreement of ASD, under which Aetna is suing the stevedore, "would not entitle the indemnitees to indemnification for their own negligence" but that "the indemnity agreement does entitle them to indemnification for negligence by the indemnitor, Atlantic & Gulf." (Order of Judge Johnstone, quoted at page 23 of Aetna's Brief in Support of Motion.) Furthermore, in a similar case, Aetna v. Cooper Stevedoring, cited earlier, the Alabama Supreme Court found that Aetna was "not seeking indemnification for negligence on the part of the State Docks; rather, it is seeking indemnification for an injury caused by Cooper's negligence and the negligence of its employees." (504 So. 2d at 217.)

Where, then, is the evidence that Aetna is attempting to seek exculpation for the negligence of its insured, ASD? In other words, where is the evidence that ASD has been negligent and has caused injuries to the four longshoremen but that Aetna, made a party by the Alabama "direct-action" statute, is attempting to have the stevedoring companies relieve Aetna from the consequences of ASD's own negligence? Complainants' answer to this question is that Aetna's third-party complaints against the stevedores in the courts are valid only if ASD

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[17] (Continued from preceding page.)
negligence because ASD is immune from suit in courts and it is its insurer, Aetna, that is sued under Alabama law and that enforces ASD's exculpatory tariff provisions while ASD "acquiesces" in Aetna's practices. (No. 87-17 Complainants' Response at 5-6.) If, as I find later, ASD's tariffs cannot authorize exculpation, then Aetna can derive no rights to enforce exculpatory provisions, and the courts ought to be able to protect the stevedores against the unlawful carrying out of exculpation by Aetna regardless of ASD's alleged acquiescence. However, as I discuss elsewhere, there is no evidence on this record to warrant a finding that either ASD or Aetna are trying to enforce ASD's tariff provisions in an exculpatory manner against the stevedores directly.

has first been found negligent, in which case Aetna, after paying damages to the injured longshoremen plaintiffs, would be seeking recovery from the stevedores, although ASD's negligence had caused the injuries. If ASD were not found negligent by the juries in the court suits, then Aetna would not have to pay the injured longshoremen and would not have to seek recovery from the stevedores for such payment. As the No. 87-13 complainants put it (Complainants' Brief in Opposition at 34):

> Thus, in order for there to be any cause of action by Aetna over against the Complainants, there must be a judgment against Aetna in the first-party complaints, which can only result from the negligence of ASD.

Complainants also explain, furthermore, that in the event that the juries find that ASD was negligent and Aetna would be liable to pay damages to the plaintiffs, and Aetna thereupon seeks to recover the same amount from the stevedores in Aetna's third-party complaints, Aetna could only recover from the stevedores if the juries found that the stevedores were additionally negligent, i.e., that the injuries to the longshoremen resulted from the combined negligence of ASD and the stevedores. However, it is argued, Aetna is seeking total recovery, i.e., "complete indemnity." Therefore, Aetna is seeking to be indemnified even for that portion of the damages which was caused by ASD, its insured. Complainants in No. 87-17 summarize these arguments, purportedly showing that the very suits by Aetna against the stevedores constitute evidence of attempts to exculpate under ASD's rental agreement. They state that Aetna "seeks indemnity from Atlantic & Gulf based upon the language of the rental agreement . . . by definition, Aetna can assert a cause of action for indemnity against A&G only after Aetna has

been held liable . . . if Aetna is found liable in the underlying action for the injury sustained by the plaintiff, such a finding will be premised upon a determination that the ASD was negligent . . . Accordingly, Aetna's claim for indemnity is clearly a claim seeking from A&G indemnification for the negligence of the ASD (Aetna's insured)." These complainants also contend that because of a special federal labor law, A&G can only be required to pay indemnification by contractual agreement, and that, therefore, Aetna is seeking indemnification "based upon the terms of ASD's rental agreement and tariff . . . for the negligence of the ASD without regard to fault." (No. 87-17 Complainants' Response to ASD's Motion, at 17-18.) (Case citations omitted from quoted language.)

Even if I construe the above facts and arguments in the light most favorable to complainants, I must still find that a preponderance of the evidence shows that respondents have violated law, i.e., that it is more probable than not that violations have occurred, the governing standard of proof in administrative proceedings such as the present ones. Steadman v. S.E.C., 450 U.S. 91 (1981); reh. denied, 451 U.S. 933 (1981); Sanrio Co. Ltd. v. Maersk Line, 19 SRR 1627, 1632 (I.D., adopted by the Commission, 20 SRR 375 (1980)); McCormack on Evidence (3rd Ed. 1984), Section 339, pp. 956-957. It is difficult, however, to find or infer from the fact that Aetna is suing the stevedores under the impleader Rule 14 in both the Federal and state courts that Aetna is attempting exculpation for ASD's negligence, especially when a judge in one of the four suits has already ruled that the language of ASD's rental agreement "would not entitle the indemnitees to indemnification for their own negligence" but would "entitle them to indemnification for

negligence by the indemnitor, Atlantic & Gulf," and in a similar case involving another third-party suit by Aetna against a stevedoring company, Aetna v. Cooper Stevedoring, cited above, the Alabama Supreme Court has characterized the suit as one "not seeking indemnfication for negligence on the part of the State Docks; rather it is seeking indemnification for an injury caused by Cooper's negligence and the negligence of its employees." (504 So. 2d at 217.) However, even if Judge Johnstone had not ruled as he did, complainants' requests in these proceedings suffer from several deficiencies in law as well as in fact. First, because of the fact that there has been no trial, verdict, or judgment issued in the four lawsuits, it is premature to contend that Aetna has obtained indemnification for ASD's own negligence, and complainants are therefore asking the Commission for an order in the nature of a preliminary injunction which would prevent Aetna from litigating its lawsuits to conclusion. However, the Commission is not a court and does not possess such injunctive-type authority. Before the Commission can issue such cease and desist orders, it must first develop a record and make findings of violations of law. See Lakes and Rivers Transfer Corp. v. Indiana Port Commission, 17 SRR 1140, 1146 (1977), citing Trans-Pacific Freight Conference of Japan v. Federal Maritime Board, 302 F.2d 875 (D.C. Cir. 1962) ("The Commission does not have injunctive or interlocutory powers."); see also Cargill, Inc. v. Federal Maritime Commission, 530 F.2d 1062, 1070 (D.C. Cir. 1976). (As I discuss later, furthermore, the filing of the third-party complaints by Aetna does not constitute evidence that Aetna necessarily must be seeking indemnification for ASD's own negligence.)

Second, as I have found earlier, the Commission has no jurisdiction over Aetna, which is an insurance company. Even if the Commission had such jurisdiction, as the Commission's decision in Stevens Shipping and Terminal Company v. SCSPA, cited above, shows, the Commission views orders directing parties who are litigants before courts what to argue or present before the courts as being "of questionable legality under the Commission's enabling statute" and as appearing "to be a usurpation of the [court's] authority to determine the issues before it in the pending civil suits." Stevens, 23 SRR at 688. (Note that the Commission refused to issue such an order in the Stevens case even against the South Carolina State Ports Authority, an acknowledged marine terminal operator subject to the Commission's jurisdiction, which was suing the stevedoring company in Federal District court in Charleston.) Therefore, if complainants wish to have someone issue an order enjoining Aetna from pursuing its complaints against them in the courts in the nature of an injunction, complainants should ask the courts which have jurisdiction over all the parties, to issue such orders. See Harrington & Co., Inc. v. Georgia Ports Authority, 23 SRR 753, 778-779 (I.D. 1986, pending decision by the Commission.) Indeed, as the No. 87-13 complainants have advised me, the courts have stayed four of the lawsuits, pending determination by the Commission as to the lawfulness of the ASD tariffs and rental agreement provisions, for the guidance of the courts. (No. 87-13 Complainants' Brief in Support of Motion at 7.) Has not this stay order acted like a preliminary injunction restraining Aetna from pursuing its claims until the Commission rules upon the Shipping Act issues?

Third, and perhaps most important of all the reasons, complainants as well as Aetna are before courts of competent jurisdiction which will be well advised as to the Shipping Act issues and are capable of protecting the interests of the stevedoring companies which are not prevented from presenting all of their claims and defenses to the courts, including the defense that Aetna is attempting to have indemnification for ASD's own negligence, in violation of the Shipping Acts. Although the Commission cannot compel a court to agree with the Commission as to the requirements of the Shipping Acts, it can advise the court at the request of the court or, if the court has not requested, at the request of a litigating party, so that the court will be aware of the Commission's views of the applicable law or regulation. (See the cases cited in Notice of Prehearing Conference and Agenda, July 2, 1987, at page 3 n. 1. See also Docket No. 87-12, In the Matter of Maximum Potential Liability in Independent Ocean Freight Forwarder Bonds, Order Granting Petition for Declaratory Order, October 9, 1987, 24 SRR____.)[18]

Complainants seem to be arguing that the very filing of Aetna's third-party complaints in the courts means that Aetna must necessarily be seeking indemnification for ASD's own negligence and that, unless the

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[18] In Docket No. 87-12, the Commission issued a declaratory order at the request of litigating parties, not the court, to resolve an uncertainty as to the limit of liability under a surety bond issued to one of the litigants pursuant to a Commission regulation. The Commission issued the order to aid the court and guide the industry. (Order cited, at 12.) No party, however, had asked the Commission to order any party to cease and desist from making its arguments to the court, nor is there any assurance that the court will agree with the Commission's rulings.

Commission steps in and issues a cease and desist order, Aetna may in fact obtain such indemnification. However, these arguments assume that the courts will not recognize that ASD's tariff provisions, through which Aetna is suing, cannot authorize indemnification for damages or injuries caused by ASD's own negligence or for any portion of damages or injuries caused by such negligence. Complainants seem to be arguing that because Aetna has used Rule 14 impleader procedures in both the Federal and State courts in Alabama[19] and has asked for "complete indemnity," that Aetna must be seeking to override the Shipping Act which forbids exculpation by ASD. However, the Rule 14 impleader procedure is designed, among other things, to accelerate determination of liability among various parties and not to change substantive law. It enables a court to apply proper substantive law, to determine various claims concurrently and to fashion whatever procedure or relief is appropriate under the circumstances. Therefore, it is not necessarily so, as complainants argue, that Aetna must be seeking unlawful indemnification because, before its claims against the stevedores could be heard in the courts, there must first be a verdict and judgment that ASD was negligent so that Aetna's third-party complaint against the stevedores would mean that the stevedores, if found negligent as well, would be forced to indemnify Aetna for that portion of the damages for which ASD was responsible. This argument overlooks the fact that the claims can be heard concurrently, that the court can apply a type of comparative negligence or comparative-fault doctrine which the courts apply in

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[19] Alabama follows the federal rules of civil procedure, including the impleader Rule 14. See VII Martindale-Hubbell, Alabama Law Digest (1986 ed.), Procedure, at 42.

the Fifth and Eleventh Circuits in maritime cases, and apportion damages according to relative responsibility between ASD and the stevedores, that the courts, whether state or federal, are obliged to follow and apply federal substantive law, in this case, the Shipping Acts, and that one should not presume that they will ignore the Commission's rulings on the Shipping Act issues. See the discussions and cases cited at 6 Wright and Miller, Federal Practice and Procedure, sec. 1442 at 204-205, notes 19 and 24; sec. 1446 at 249-250; sec. 1448 at 263 n. 82; 264-265 n. 86; sec. 1451 at 282-3 (Rule 14 allows a court to accelerate determination of liability and to shape the relief on an accelerated or contingent claim to reflect the limitations of substantive law; Rule 14 does not create any new right of action or affect substantive law).

It is true that some courts including the Alabama Supreme Court have stated that they will not be bound by opinions of the Commission and that in some states there is no right to contribution among tortfeasors or the states follow other common-law doctrines. However, both state and federal courts are bound to follow federal substantive law, and here the matter involves federal substantive maritime law and not state law of contribution among tortfeasors. The courts that have considered issues arising under indemnity agreements or tariffs in a maritime context have recognized that it is federal maritime law that governs. Even the Alabama Supreme Court in Aetna Casualty & Surety Company v. Cooper Stevedoring Company, cited above, held that the indemnity clause in the agreement between ASD and the stevedore "is a maritime contract, and the interpretation of such an agreement must be made by applying federal maritime law." (504 So.2d at 217.) See also

F.E.R.C. v. Mississippi, cited above, 456 U.S. at 760 (". . . the policy of the federal Act is the prevailing policy in every state . . . and should be respected accordingly in the courts of the State. . ."); M.O.N.T. Boat Rental Services, Inc. v. Union Oil Co. of California, 613 F.2d 576, 579 n. 6 (5th Cir. 1980); Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge Known as Mr. Charlie, 424 F.2d 684, 691 (5th Cir. 1970); Giacona v. Marubeni Oceano (Panama) Corp., cited earlier, 623 F.Supp. at 1568 (vessel owner "is undoubtedly correct in contending that federal maritime law governs the interpretation of [the terminal operator's] indemnity provisions.") See also Schoenbaum, Admiralty and Maritime Law (West Publishing Co. 1987) sec. 4-15 at 146 ("The substantive and legal rights of the parties are governed by federal maritime law, not state law.").

It is to be hoped that the state and federal courts hearing the various lawsuits will not ignore the Commission's rulings in these administrative proceedings, especially since the courts have stayed four lawsuits to await the Commission's guidance, as No. 87-13 complainants have advised. (See No. 87-13 Complainants' Brief in Support of Motion at 7.) It would, furthermore, be rather surprising if the courts would ignore the Commission's determinations or reach a contrary interpretation of the ASD's indemnity provisions when one state court judge (Judge Johnstone in the Turk litigation) has already found that the ASD provision "would not entitle the indemnitees [i.e., Aetna and ASD] to indemnification for their own negligence." When one adds the fact that ASD itself does not claim that its tariff provision authorizes its own exculpation and the fact that the Commission, if it agrees with my decision, will also agree with ASD, it does not seem likely that the

courts will interpret the provisions in question to authorize exculpation of ASD even if the courts refuse to apply the Shipping Acts and follow federal maritime case law.[20] Moreover, there is reason to believe that the courts will follow a comparative-fault doctrine, which the Fifth and Eleventh Circuits both endorse in maritime cases,[21] rather than a doctrine under which the stevedores would be held totally responsible for all damages, even for the portion caused by ASD's negligence, if the facts ultimately show such negligence. See Loose v. Offshore Navigation, Inc., 670 F.2d 493, 498-502 (5th Cir. 1982); Hercules, Inc. v. Stevens Shipping Co., 765 F.2d 1069, 1075 (11th Cir.

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[20] Courts have become increasingly reluctant to enforce exculpatory contracts both in contract and maritime law generally. When they are enforced, it is usually because there is extremely clear language in the agreement and the courts are convinced that the indemnitor freely agreed to indemnify the other party even for the other party's negligence. In federal maritime law, such as that applicable to private, unregulated terminal operators, for example, broad indemnification provisions in the terminal operator's tariff have been held non-enforceable against a vessel owner even though applying to "any and all claims," because the court nevertheless found the language of the tariff insufficiently clear and unequivocal. See Giacona v. Marubeni Oceano (Panama) Corp., cited earlier, 623 F.Supp at 1569-1571; M.O.N.T. Boat Rental Services, Inc. v. Union Oil Co. of California, 613 F.2d 576, 580 (5th Cir. 1980); Wedlock v. Gulf Mississippi Marine Corp., 554 F.2d 240, 241 n. 2 (5th Cir. 1977); Transcontinental Gas Pipe L. Corp. v. The Mobile Drilling Barge, 424 F.2d 684, 691-692 (5th Cir. 1970). For a discussion of indemnity contracts under federal maritime law, see Schoenbaum, Admiralty and Maritime Law (West Publishing Co. 1987), sec. 4-15 at 152; sec. 6-14 at 233-234 n. 9. For a discussion of indemnity contracts generally, see Prosser and Keeton, Law of Torts (5th Ed. 1984) sec. 51 and sec. 68 at 482-484; Annotation - Limiting Liability for Own Negligence, 175 A.L.R. 8-157 (1948).

[21] It should be noted that the Eleventh Circuit Court of Appeals, in an en banc decision, has held that decisions of the Fifth Circuit Court of Appeals rendered prior to October 1, 1981, are adopted as precedent. See Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981).

1985) ("Unless it can truly be said that one party's negligence did not in any way contribute to the loss, complete apportionment between the negligent parties, based on their respective degrees of fault, is the proper method for calculating and awarding damages in maritime cases." See also Harrison v. Flota Mercante Grancolombiana, S.A., 577 F.2d 968, 981-982 (5th Cir. 1978). In Schoenbaum, Admiralty and Maritime Law, cited earlier, the author states (at page 234 n. 9):

> In interpreting indemnity agreements, the courts follow the guidelines set out by the Supreme Court in United States v. Seckinger, 397 U.S. 203 . . .; the doctrine of comparative negligence should be applied unless there is a clear and unequivocal expression of intent on the part of both parties to indemnify the indemnitee for his own fault. Id. at 215-216 . . . . Where there is a disparity in bargaining power, the court will be reluctant to allow full indemnity, and contract provisions for indemnity are construed strongly against the drafter.

The Alabama Supreme Court, in Aetna Casualty and Surety Co. v. Cooper Stevedoring, cited earlier, has cited United States v. Seckinger with respect to requiring clear expression of intention by parties to indemnity contracts that the indemnitee will be given payment for his own negligence. (504 So.2d at 219.)

If the courts follow the Commission's decisions and regulations, which forbid regulated marine terminal operators from publishing exculpatory provisions in their tariffs or from engaging in practices which would require users of the terminal facilities to indemnify the terminal operators for damages caused by the operator's own negligence, or even if they follow federal maritime case law, as described above, the courts will not allow Aetna to carry out ASD's tariff provisions in an exculpatory way and will very likely apply the doctrine of comparative fault, which the Commission's regulations in no way forbid. On the

contrary, in promulgating its regulations in Docket No. 86-15, Filing of Tariffs by Marine Terminal Operators, Exculpatory Provisions, 23 SRR 1601 (1986), the Commission addressed this very question raised by the comments, namely, would its regulations interfere with the comparative negligence doctrine followed in maritime and admiralty law. The Commission rejected the argument and found that it was the exculpatory provisions in the tariffs that were overriding these doctrines, not the proposed regulations. (See 23 SRR at 1603-1604.) ("We also find unpersuasive the contention that the rule somehow infringes on the comparative negligence doctrine in maritime and admiralty law . . . Exculpatory tariff provisions are, in fact, an attempt to override the traditional application of the comparative negligence doctrine in damage suits resulting from terminal accidents.")

I conclude, therefore, that there is no evidence that ASD has been or is engaging in unreasonable and unlawful exculpatory practices or that its statutory insurer, Aetna, is carrying out such practices by virtue of Aetna's suing the stevedores in the courts under third-party complaint and impleader procedures. I conclude, furthermore, that the stevedore complaints in these Commission proceedings are seeking to have the Commission enjoin Aetna, a non-jurisdictional person, from pursuing its claims in the courts, something which is beyond the Commission's authority. I conclude also that the concerns expressed by the stevedores do not take into account the fact that the courts, which have jurisdiction over Aetna, can apply proper law and protect the stevedores' interests against being held responsible for any portion of

damages which may have been caused not by themselves but by ASD, if the facts ultimately reveal that ASD was negligent in whole or in part.[22]

The second and final non-jurisdictional issue concerns whether the language of ASD's tariffs and rental-agreement provisions on their faces constitutes an unreasonable practice in violation of the shipping acts. In their complaints and briefs complainants specify three provisions of ASD's Tariff No. 1-C and three corresponding provisions of Tariff No. 11 (the Bulk Materials Handling Plant tariff) consisting of indemnification, waiver of claims, and consent to tariff terms, and indemnification provisions of ASD's equipment rental agreement, which renters of ASD's cranes sign. Complainants' main attacks are directed against the indemnification provisions.

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[22]The No. 87-17 complainants argue that under the Longshoremen's and Harborworkers' Compensation Act (LHWCA), A&G Stevedores, "which is paying the plaintiff in the underlying action compensation pursuant to the LHWCA and which is immunized from suit by the plaintiff by virtue of the LHWCA, cannot be held liable to Aetna for contribution under any circumstances." (No. 87-17 Complainants' Response at 17 n. 1.) If so, and if this is a foolproof defense against Aetna, why is A&G asking the Commission to stop Aetna from suing in the court? Is not the LHWCA a federal statute which the courts in Alabama are bound to enforce? Under some circumstances, apparently, stevedore employers paying workmen's compensation are immunized from further liability under the LHWCA, and the comparative-negligence doctrine is not followed as regards the stevedore employer. However, such principles apparently apply when a vessel is being sued by the injured longshoreman. When a third party, such as a terminal operator, is being sued by the longshoreman, as in the four lawsuits in Alabama, apparently the LHWCA does not preclude such third person's suing the employer. See Schoenbaum, Admiralty and Maritime Law, cited earlier, at 233 n. 9, citing Pippen v. Shell Oil Co., 661 F.2d 378 (5th Cir. 1981). See also Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979); Johnson v. American Mutual Liability Insurance Co. et al., 559 F.2d 382 (5th Cir. 1977); 32 Am Jur2d, Federal Employers' Liability, etc., sec. 137.

The indemnification and waiver-of-claims provisions of ASD's tariffs and rental agreement, in relevant portions, are set forth as follows:

> Items 108 and 160 (Indemnity)
>
> Each person using a facility of the Alabama State Docks Department and each person performing any service on the property of the [ASD] shall indemnify and save the [ASD] harmless from and against any and all claims, actions, damages, liability, and expense . . . in connection with loss of life, personal injury and damage to property . . . occurring in connection with the use of any facility of the [ASD] and the performance of any service on the property of the [ASD] caused in whole or in part by such person . . . except for any such loss occasioned by reason of the Department's own negligence. Each person using a facility of the [ASD] . . . waives all claims it may have against the [ASD] for loss or damage covered under any insurance policy and each such person shall cause its insurance carriers to waive any right of subrogation with respect thereto and to so notify the [ASD]. (Emphasis added.)
>
> Items 116 and 150 (Insurance)
>
> Each stevedore desiring the use of any of the facilities of the [ASD] shall keep in full force and effect a policy of public liability and property damage insurance in connection with its operations to be carried out on the property of the [ASD] naming such stevedore and the [ASD] (for liability of the [ASD] arising out of or in connection with the operations of such stevedore on the property of the [ASD]) as the insured . . . and shall contain an endorsement insuring the stevedore's indemnity set forth in Item 108.
>
> Items 106 and 140 (Consent)
>
> The use of the Port Facilities under the jurisdiction of the [ASD] shall constitute a consent to all of the terms and conditions of this tariff, and evidences an agreement on the part of all common carriers, vessels, their owners and agents, or other users of such terminal facilities to pay all charges specified herein, and be governed by all rules and regulations shown in this tariff.

The ASD's Uniform Equipment and Machinery Rental Agreement contains the following provisions (Exhibit 15):[23]

> Subject to and in accordance with all the terms and conditions in effect on date hereof of [ASD] Tariff No. 1-C, amendments thereto or reissues thereof, same being adopted as a part hereof though as if fully set forth herein, and further, Subject to the right of the Insurer of the [ASD] to enforce any of the terms and conditions of this Agreement including the applicable terms and conditions of [ASD] Tariff No. 1-C, amendments thereto or reissues thereof, which right of said Insuror is hereby acknowledged and made a term and condition hereof.
>
> Lessee/User covenants to indemnify and hold Owner and its Insuror harmless against any loss whatsoever, personal or property, which may be occasioned during the use or possession

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[23] The provisions of the rental agreement are taken from Exhibit 15, which appears to be an actual agreement signed by A&G on August 13, 1985. ASD, however, has attached a slightly different blank form of the rental agreement as Appendix 3 to its Motion to Dismiss and to which ASD's affiant Mr. Browning refers. (See Browning Affidavit at para. 10.) The main change is in the "hold harmless" provision, which, in the Browning version, contains an exception in case of "losses resulting directly from the proven negligence of Owner/Lessor. . . ." Because the rest of the agreements are virtually identical and because they are both made subject to the governing tariff, my decision is the same as regards either version. It is not clear from the record which version is now in use, but presumably the Browning version is the current one. No. 87-13 complainants have argued that the rental agreement should have been attached to or made a part of the tariffs. (No. 87-13 Complainants' Brief in Support of Motion at 26.) ASD appears to have ignored the argument. I agree with complainants. The above uncertainty as to which rental agreement is in use at any particular time shows the desirability of having the agreement included in the tariff itself and would ensure that all renters would be signing the same agreement. The rental agreement, furthermore, does not merely carry out the terms of the tariff but also adds specific reference to the ASD's insuror's rights to enforce the tariff and to be notified and to be held harmless, and adds other matters not spelled out in tariff No. 1-C. It therefore has more substantive effect than the "consent" provisions already in the tariff. Under such circumstances, it ought to be included in the tariff to which it refers. See SEMCO v. GPA, 23 SRR at 549, in contrast to Stevens v. SCSPA, 23 SRR at 781-782 (a ministerial customer data sheet adding nothing to the tariff). The ASD's previous failure to file the rental agreement with the tariff, however, does not mean that the agreement is a nullity and cannot be carried out if otherwise reasonable. Even if carriers fail to file their tariffs, they are allowed to charge reasonable rates. See FIDCO v. SOS, 20 SRR 209, 213 n. 9, 214, recons. denied, 20 SRR 427 (1980); reversed on other grounds, SOS, Inc. v. F.M.C., 670 F.2d 304 (D.C. Cir. 1981).

> by Lessee/User of the property . . . Such indemnification shall include the cost of any defense, which the Owner or its Insuror may be put to by virtue of any claim for loss, personal or property, arising out of Lessee/User's use of the property made the subject matter of this Agreement.

Essentially, complainants contend that the above provisions are unlawful on their faces because they are ambiguous and can be read to authorize ASD to obtain indemnification even when ASD was partially at fault. Complainants argue that this could happen, even though ASD amended its tariffs on May 25, 1982, to provide specifically that users would have to hold ASD harmless "except for any such loss occasioned by reason of the Department's own negligence."[24] Complainants contend that one could read the tariff to mean that if ASD were partially negligent, the user would have to indemnify ASD for all the damages even for that portion caused by ASD, not the user. Complainants cite a number of decisions of the Commission, in which it was held that ambiguous tariff provisions which could be read to make users indemnify terminal operators even for those portions of damages caused by the terminal operator's negligence, were unlawful and unenforceable and were ordered stricken or amended to conform to lawful practices. Complainants also argue that notwithstanding the specific reference to the language of the equipment rental agreement that the agreement was "subject to and in

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[24] The original complaint in No. 87-13, in which complainants had alleged that ASD's tariff provisions were unlawful, referred to the ASD tariff provisions regarding indemnification before they were amended in 1982. Before the amendment, the tariff stated that users of the facilities would hold ASD harmless "without regard to fault." No. 87-13 complainants have since amended their complaint to specify the current tariff language which, as seen, makes an exception in case of ASD's "own negligence."

accordance with all the terms and conditions of . . . [ASD's tariff]," the rental agreement is unlawful on its face, is not clearly subordinate to the tariff, and contains inherent ambiguities.

ASD replies that it amended its tariffs in 1982 to conform to the Commission's decision in West Gulf Maritime Association v. City of Galveston, 22 F.M.C. 101 (1979), recons. denied, 22 F.M.C. 401 (1980) (WGMA/Galveston), and that the ambiguity which is claimed to exist exists "solely in the minds of counsel for Pate," and is an argument designed solely to bring ASD's current tariff language under the WGMA/Galveston doctrine so that it could be ordered stricken although ASD's tariff language is significantly different from that in WGMA/Galveston. Furthermore, ASD argues that the equipment rental agreement is made subject to the governing tariff provisions expressly and therefore the agreement cannot authorize exculpation by ASD. Other provisions of ASD's tariff, such as the waive of claims, argues ASD, must be read in the context of the whole tariff, which does not exculpate and therefore those provisions are not unlawful. I agree with ASD.

Whatever the merits of complainants' arguments that ASD's tariff and rental agreement provisions are ambiguous and should therefore be declared nullities, it is evident that if the stevedores can obtain a favorable decision from the Commission or the courts on this matter, it would probably nullify Aetna's right to sue in the courts because Aetna is asserting its third-party claims through ASD's tariff provisions. See Aetna Casualty & Surety Company v. Cooper Stevedoring Co., cited above, 504 So.2d at 216. However, I find that in the previous cases in which indemnification provisions of terminal tariffs have been found to

be unreasonable and unlawful, the particular tariff provisions, unlike ASD's since 1982, did not contain provisions guarding against exculpation. Furthermore, even if there were still ambiguities which require correction because complainants have found them, the solution would not necessarily be that the provisions must be found to be totally unenforceable and that ASD could not be indemnified even for those portions of damage caused by a user's negligence. Neither the Commission's regulations, which codify the previous decisions in this area of law, nor those decisions specify any particular type of corrective language that must be added to indemnity provisions in terminal tariffs, although in one case the Commission appeared to approve amendatory language virtually identical to that employed by ASD in its tariff. Finally, a random sampling of other terminal tariffs shows that there is no particular amendatory language that the Commission requires. Therefore, although it is possible for ASD to use even better language by way of clarification in its tariffs, there is at present no legal requirement imposed by the Commission that it adopt any particular language.

The governing regulation of the Commission holding that exculpatory provisions in the tariffs of regulated marine terminal operators are unlawful was promulgated by the Commission, effective February 23, 1987. See Docket No. 86-15, Filing of Tariffs by Marine Terminal Operators, Exculpatory Provisions, cited earlier, 23 SRR 1601. The particular regulation states (46 CFR 515.7):

> No terminal tariff shall contain provisions that exculpate or otherwise relieve marine terminal operators from liability for their own negligence, or that impose upon others the obligation to indemnify or hold-harmless the terminals from liability for their own negligence.

This regulation was the culmination of a number of Commission decisions in which terminal tariff provisions containing exculpatory language had been found to be unreasonable and unlawful and had been ordered canceled or stricken from the tariffs. These cases are discussed in the Notice of Proposed Rulemaking, 23 SRR at 1605-1608. They are also collected and discussed in Stevens Shipping and Terminal Company v. Georgia Ports Authority, 23 SRR 267, 272-275 (I.D., adopted by the Commission, 23 SRR 684 (1985). There are two things to note about the above regulation and the cases on which it is based. First, the regulation forbids terminal operators from retaining exculpatory provisions in their tariffs but does not specify any particular language that must be substituted. Second, in the decisions of the Commission, which the regulation in effect codified, the particular tariff provisions which had been found to be unlawful contained no limitations, i.e., the users of the terminals were required to indemnify the terminal operators without regard to who was at fault.[25] ASD's tariff, prior to May 25, 1982, had contained such a "without regard to fault" provision, as noted previously. However, after the Commission's decision in WGMA/Galveston, forbidding such unlimited provisions, ASD amended its

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[25] These Commission decisions are discussed in the Notice of Proposed Rulemaking and in Stevens at the pages cited above. In each of the eight cases in all, the tariff provisions required indemnification or imposed liability on users of the facilities without regard to who was negligent and in one (SEMCO v. GPA, 23 SRR 941, 942 (1986)), the terminal imposed liability on the user and did so expressly even if the terminal was wholly or partly at fault. The cited pages quote the particular tariff language in each case except for Wilmington Stevedores v. Port of Wilmington, 23 SRR 409, 410 (1985); and for SEMCO v. GPA, just cited. These last two citations, however, show that the tariffs in these two cases also imposed liability on users without exception for the port's own negligence.

tariffs to provide that ASD would not be indemnified "for any such loss occasioned by reason of the Department's own negligence," as I have mentioned earlier. Complainants argue that this amendatory language is still not good enough because one could read the language to mean that ASD could still demand indemnification for all damages even if ASD were partially at fault. However, the Commission has not only not dictated to terminal operators the precise language to be used in their tariffs, but in one case has approved tariff language which is virtually identical to that used by ASD. Thus, in Reefer Express Lines, Pty., Ltd. v. Uiterwyk Cold Storage Corp. et al., 21 SRR 1518, 1524 (1986), the Commission found that an unlimited terminal tariff provision at Tampa was exculpatory and required revision. The Commission found that the terminal's proposed revision that would have precluded the terminal from having indemnification in cases of the terminal's "sole negligence" was "inappropriate." Instead, the Commission found that the following revision to the tariff would be "most appropriate" (23 SRR at 1524 n. 15):

> When warehouse checking is requested not to be performed, terminal operators will not be responsible for any overages and/or shortages, except where such shortages and/or overages resulted from the negligence of the terminal operator.

Furthermore, a random sampling of terminal tariffs confirms that there is no precise model language that the Commission has imposed on terminal operators, that some terminal operators have filed amendatory

language similar to ASD's, others have gone beyond ASD's language, and others may not yet have complied with the regulation.[26]

In view of the above status of the law, I have no basis to find that ASD must amend its tariff further than it already has done or else be found to have violated law. Moreover, the remainder of complainants' arguments, namely, that the tariff provisions are still ambiguous, as is the equipment rental agreement, I find to be strained. It is a basic principle of tariff law that strained and unnatural constructions of language are not favored, that tariffs should be read reasonably, and that if there is an ambiguity, the ambiguity is construed in favor of

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[26] Thus, the Tampa Port Authority Tariff Item 440, effective February 22, 1987, states that "[n]othing contained herein shall be deemed to exculpate or relieve the Authority from liability from the negligence of the Authority, its members, etc." The New Orleans Dock Dept. Tariff, FMC T No. 1, 8th rev. page 21 1/2, precludes indemnification of the terminal for any liability "which may arise out of its own negligence." The Georgia Ports Authority Terminal Tariff FMC-T8, Item 125, effective October 20, 1987, relieves users of the facilities "for that portion or percentage of such losses, if any, caused by the negligence of The Georgia Ports Authority." The San Francisco Port Commission Tariff No. 3-C, 6th rev. page 9, March 27, 1987, states that "[n]othing herein shall be deemed to relieve the Commission from liability for loss or damage to goods or property it may have by law as the result of its own negligence." The South Carolina State Ports Authority Terminal Tariff No. 1-A, 5th Amended Page 13, February 1, 1986, Item 20, provides that "[t]his item is not to be construed as requiring any user to indemnify the Authority for that portion or percentage of such losses, et cetera, if any, caused by the negligence of the Authority." The Georgia and South Carolina tariffs appear to spell out the comparative-negligence rule in modern admiralty law in the most explicit manner but, as discussed, the Commission has not required terminal operators to use such precise language. The current tariffs used in Miami and Jacksonville, Florida (Port of Miami Tariff No. 10, Item 212, September 16, 1970; Jacksonville Port Authority FMC-T No. 23, Item 40, October 1, 1987), do not appear to provide an exception for the port's own negligence as yet, but the matter is being pursued by the Commission's staff. These various tariff items are filed with the Commission, and I take official notice of them and of the Commission's staff's ongoing enforcement program. See 46 CFR 502.226(a).

the user of the tariff. See, e.g., Bratti v. Prudential et al., 8 F.M.C. 375, 379 (1965); C.S.C. Int'l v. Lykes Bros., 20 F.M.C. 551, 555 (1978); Coca-Cola Export Corp. v. Peruvian Amazon Line, 23 SRR 339, 341 (I.D., adopted by the Commission, 23 SRR 701 (1986)); Ingersoll Rand Co. v. U.S.L.S.A., 22 SRR 1281, 1283 (I.D., F.M.C. notice of finality, November 27, 1984). Furthermore, as some of these cited cases indicate, one should not read a tariff so as to reach absurd results. See Coca-Cola Export Corp., cited above, citing Trans Ocean Van Service v. U.S., 426 F.2d 329, 336 (Ct.Cl. 1970); see also National Van Lines, Inc. v. U.S., 355 F.2d 326, 332, 333 (7th Cir. 1966).

Although ASD's tariffs now state that in case of loss of life, personal injury and damages to property caused in whole or in part by users of the ASD facility, the user must indemnify ASD "except for any such loss occasioned by reason of the Department's own negligence," complainants contend that one could read this language to authorize ASD to require indemnification if ASD were partly negligent. However, if one is not supposed to read tariffs so as to reach absurd or unreasonable results, why should one be able to read tariffs so as to reach an unlawful, specifically prohibited result? Furthermore, even if one could find an ambiguity in the tariffs as complainants argue, that does not mean that the tariffs must be declared to be nullities, which the Commission only held to be the case when terminal tariffs had no exceptions for the terminal's own negligence. The tariff could instead be construed in favor of the user, in which event the user would not have to indemnify ASD for that portion of damages caused by ASD's own negligence. Or better still, the tariff can be interpreted in such a way as to avoid an illogical, unreasonable, or unlawful result. For example,

in National Van Lines Inc. v. United States, cited above, the carriers had created ambiguities in their tariffs by omitting a note, and certain shippers, relying on the omission, claimed that they had been overcharged. The shippers' interpretation, however, resulted in illogical and perhaps even unlawful rates unrelated to proper ratemaking factors. The I.C.C., construing the tariffs against the carriers, found for the shippers. The Court, however, reversed, finding a better method of interpreting the tariffs. The Court stated (355 F.2d at 333):

> It is contended for the Commission, that any ambiguity which appears in the tariffs must be resolved in favor of the shippers, that the carriers should not receive the benefit of a liberal rule of construction. It is true that doubt about the meaning of tariffs is generally resolved against the carriers as a corollary to the rule that written instruments will be construed strictly against their drafters. (Citations omitted.) However, we do not think that such a rule should be followed when it is outweighed by other equally settled and applicable rules of construction. A strict construction of the tariffs against the carriers who drafted them is not justified when such construction ignores a permissible, reasonable construction which conforms to the intention of the framers of the tariff, avoids possible violations of the law, and accords with the practical application given by shippers and carriers alike.

Obviously, the subject tariff provisions can be interpreted to conform to the principle that regulated terminal operators cannot in their tariffs require users of their facilities to indemnify the terminal operator for any damages or portions of damages caused by the terminal operator's own negligence, which, incidentally, appears to have been the intention of ASD when it amended its tariffs to conform to the Commission's decision in WGMA/Galveston.

Complainants make similar arguments regarding ASD's equipment rental agreement and the waiver-of-claims portion of the tariffs' indemnity provisions (Items 108 and 160 in the two ASD tariffs).

Complainants argue that the rental agreement contains within it separate indemnity provisions which could require renters to indemnify ASD for ASD's own negligence, that there are two indemnity agreements in the rental document, one not subject to the tariff and the other so subject, or, in any event, there is an ambiguity so that any reliance on the rental agreement by Aetna or ASD would be unlawful. ASD replies, however, that the rental agreement is expressly made subject to the tariff. In other words, the tariff Item 108, "which expressly precludes indemnity where ASD is negligent, is an integral part of the rental agreement." (ASD's Motion to Dismiss at 7.) I agree with ASD.

Although read in isolation without the introductory language shown in the rental agreement, one could construe the provisions of the agreement to authorize indemnification for ASD's own negligence, the simple fact is that the rental agreement contains express language in the introductory section that makes the whole agreement "subject to and in accordance with all the terms and conditions . . . of Alabama State Docks Department Tariff No. 1-C. . . ." (Exhibit 15.) Because the ASD tariff provision (Item 108 in Tariff No. 1-C) prohibits exculpation of ASD for ASD's own negligence, so must the rental agreement, which is subordinate to the tariff. As one court has stated the governing principle, "where one instrument refers to another instrument in specific terms which clearly shows an intent to make it part of the contract, both instruments are to be construed together." See Giacona v. Marubeni Oceano (Panama) Corp., cited earlier, 623 F.Supp. at 1568, and cases cited therein. Therefore, as was the case with the basic indemnity provisions in ASD's tariffs themselves, if there is any inconsistency or ambiguity in the rental agreement regarding the matter

of exculpation of ASD, the ambiguity can be resolved in the user's favor but, more importantly, by reading the entire rental agreement, a reasonable interpretation is possible and conforms to the stated intentions of ASD.[27]

As to the waiver-of-claims portion of the tariffs' indemnification items, as ASD again points out in reply (Reply of ASD at 11-12), the Commission has found such provisions unlawful but only in conjunction with an exculpatory provision. In other words, a waiver-of-claims provision has not been found to be unlawful in a vacuum but only insofar as it implements an underlying exculpatory provision. See WGMA/Galveston, cited earlier, 22 F.M.C. at 104 ("We find the indemnity requirements and the waiver of claims and subrogation provisions of the Port's tariff are unreasonable. . ."). See also WGMA/Galveston, 22 F.M.C. at 105 ("For the reasons set forth in our discussion of Item 98.1 [the indemnity provision], we conclude that the indemnity insurance requirement of Item 98.3 violates section 17. It is unreasonable to require a user to indemnify the Port against the Port's own

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[27] No. 87-17 complainants cite SEMCO v. GPA, cited earlier, in support of their argument that the Commission has found similar rental agreements to be unlawful in other cases. However, in SEMCO, the particular rental agreement provisions, which, incidentally, were contained in one of GPA's tariffs, were unlawful because they made no exception in case of the port's own negligence. However, most importantly, nowhere in GPA's tariffs did the port make an exception in case of the port's own negligence. Indeed, GPA had defended the exculpatory provisions on the ground that they were the product of arms-length bargaining. The provisions in SEMCO, therefore, were purely and simply exculpatory provisions and, unlike ASD's tariffs, made users hold GPA harmless regardless of who was at fault. See SEMCO v. GPA, 23 SRR at 942-943. The SEMCO case also illustrates the fact that putting the rental agreement provisions into a port's tariff is not enough to make the provisions lawful.

negligence, and it is equally unreasonable to require the user to insure that indemnity."). See also SEMCO v. GPA, 23 SRR 530, 550 (I.D., adopted by the Commission, 23 SRR 941, 944 (1986)) holding that the port's requirement that users name the port as an added insured in the users' insurance policies was unlawful as "an extended implementation of the exculpatory clauses of the tariff." These decisions of the Commission, it should be noted, are consistent with another principle of law governing the interpretation of tariffs, which bears repeating, namely, that a tariff must be read as a whole and not in isolated pieces taken out of context. See Texasgulf, Inc. v. United Gas Pipeline Co., 610 F.Supp. 1329, 1338 n. 33, and cases cited therein; 617 F.Supp. 41 (D.D.C. 1985), decision vacated after settlement.

Other provisions of ASD's tariffs that complainants allege to be unlawful are the "consent" provisions. These provisions (Items 106 and 140 of the two ASD tariffs) state that the use of the port facilities constitutes consent by the user to the terms and conditions of the tariff and evidences an agreement by the user to pay all charges specified in the tariff and to be governed by the rules and regulations of the tariff. (See these Items quoted at pages 20 and 22 of the No. 87-13 Complainants' Brief.) However, the Commission has held that such consent provisions add nothing to the tariff, do not bind users to unlawful practices or provisions, and are essentially harmless. See Stevens, cited earlier, 23 SRR at 270-271, and cases cited therein (I.D., adopted by the Commission, 23 SRR 684, 687 (1985)).

I conclude, therefore, that ASD's tariff provisions regarding indemnification, waiver of claims, and consent by users and the equipment rental agreement are not unlawful and comply with the

requirements of law as enunciated by the Commission in its case law and regulations codifying such law, and that there is no basis on this record to declare them to be nullities because of the ambiguities which complainants perceive from the particular language employed in the tariffs or agreement.[28] It should be strictly understood, furthermore, that it is unlawful under the shipping acts for any regulated marine terminal operator such as ASD either to publish provisions in its tariffs which authorize exculpation for ASD's own negligence or for ASD to carry out exculpatory practices under its tariffs at any facility which is subject to the Commission's jurisdiction.

The Insurance Issue

The last issue to be discussed is somewhat complicated and warrants special consideration. The arguments center on Item 116 in ASD's Tariff No. 1-C and Item 150 in Tariff No. 11 which, in relevant part, is identical. These two provisions essentially provide that a stevedore

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[28] This is not to say that the language employed by ASD or any other terminal operator in a tariff cannot be improved or that the suggestion of No. 87-13 complainants that ASD should have used the language "except for and to the extent of any such loss occasioned by reason of the Department's own negligence" to make clear that ASD was not seeking exculpation is not worth considering. (See No. 87-13 Complainants' Brief in Opposition at 38-39.) However, as discussed, the Commission has not imposed any particular language on the terminal operators. Had ASD actually used the language quoted however, even this would not necessarily have satisfied the complainants, who state that using their own suggested language "still leaves open the question of user's responsibility to indemnify the terminal operator for any negligence of a third party (other than user and terminal operator) who may have contributed to the injuries or damages and who may or may not be named as a third-party defendant by Aetna. . . ." (Brief, cited above, at 39 n.15.)

desiring to use ASD's facilities shall take out an insurance policy of public liability and property damage "naming such stevedore and the ASD . . . as the insured" and that such policy will be "for liability of the [ASD] arising out of or in connection with the operations of such stevedore on the property of the [ASD]. . ." and such policy "shall contain an endorsement insuring the stevedore's indemnity set forth in Item 108" (or for Tariff No. 11, Item 160, the corresponding indemnity provisions of that tariff).

Complainants link these insurance provisions to the underlying indemnity provisions of ASD's tariffs and argue that the insurance provisions, in effect, are an implementation of the underlying indemnity provisions, which latter provisions, as we have seen, the complainants believe to be exculpatory. (See No. 87-13 Complainants' Brief in Opposition at 40, 41, 50, 51; No. 87-17 Complainants' Brief in Support of Motion at 22-23.) No. 87-17 complainants, for instance, cite WGMA/Galveston, 22 F.M.C. at 104-105, in which case the Commission found an insurance provision in the port's tariff to be unlawful because it required the user expressly to insure the indemnity requirement in the port's tariff, which requirement had been found to be exculpatory. ASD replies to these arguments by contending that the insurance provisions in ASD's tariffs are not tied into exculpatory provisions, as was the provision in WGMA/Galveston, and that ASD's insurance provisions do not therefore carry out unlawful exculpation. (Reply of ASD at 13.)

The insurance issue is further complicated, however. That is because No. 87-13 complainants state that Aetna is proceeding against three of the stevedores' insurance companies who are complainants in these administrative proceedings. Complainants contend that Aetna is

suing Employers National Insurance Company (ENIC), the insurer of the stevedore, Ryan-Walsh, in Federal District Court in Alabama, under the insurance contract between ENIC and Ryan-Walsh. ASD is named as an additional insured in that contract because of ASD's tariff provisions mandating such insurance, without any allegation that Ryan-Walsh was negligent. (See Exhibit 8, and attachments thereto.) Also, Aetna is allegedly proceeding in some fashion against North River Insurance Company, insurer of Pate Stevedoring Company, in the Fleeton litigation, and against American Mutual Liability Insurance Company, insurer of Murray Stevedoring in the Pettway litigation, under the contracts between the insurers and the stevedores which were mandated by ASD's tariffs. (See amended complaint in No. 87-13, at pages 11, 12, 14; No. 87-13 Complainants' Brief in Opposition at 36.) Therefore, No. 87-13 complainants are asking not only that the Commission declare ASD's tariff indemnity provisions to be nullities but also to declare that the insurance contracts, which presumably name ASD as an insured and cover ASD's liabilities as well as those of the stevedores, to be nullities as well. (See No. 87-13 Complainants' Brief in Opposition at 50-52.)

The import of complainants' arguments is that ASD, an acknowledged marine terminal operator subject to the Commission's jurisdiction (except perhaps at its Bulk Plant), is "hiding behind" its insurer, Aetna, and is "acquiescing" in Aetna's attempts to have indemnification for ASD's own negligence while ASD sits quietly in the background. (See also No. 87-17 Complainants' Response to ASD's Motion at 6.) Or, as counsel for ASD remarked at the prehearing conference, ASD is not a party to the various lawsuits in Alabama, and the suits really involve

disputes between two groups of insurance companies, i.e., Aetna and the stevedores' insurers. (See Prehearing Transcript at 76, 84.)

Whatever the merits of these arguments, the fact remains that complainants are attacking the insurance provisions of the ASD tariffs because the complainants believe that these provisions are related to underlying exculpatory provisions in the tariffs and are merely means to carry out such exculpatory provisions. However, as discussed earlier, ASD has amended its tariff so as to remove the objectionable exculpatory portions of Item 108 and Item 160. Therefore, the question is whether the current insurance Items 116 and 150, which refer specifically to the amended Items 108 and 160, respectively, are themselves unlawful either because of ambiguity or because they are indirect means of exculpating ASD for ASD's own negligence. Furthermore, if so, are they to be declared to be complete nullities as complainants ask? I find that there are ambiguities in the insurance provisions cited but they can be read so as to give them legal effect to the extent that they are not permitted to exculpate ASD indirectly by means of insurance. I recognize, however, that the record on this particular issue and the arguments have not been fully developed nor have all the relevant cases been cited. Normally I would have deferred issuing a summary judgment and would have instructed the parties to develop the record further. However, because the parties have rights of appeal and exceptions now, the inadequacies of the record may be cured when the parties present their arguments to the Commission, and I need not hold back my decision on what may primarily be questions of law on the interpretation of the Commission's two decisions in WGMA/Galveston and SEMCO v. GPA, cited earlier.

The ambiguities in Items 116 and 150 arise from the fact that the items require the stevedore to take out insurance naming the ASD as an insured and covering the ADD's liability but limit the item by reference to Items 108 and 160, which no longer require stevedores to hold ASD harmless for ASD's own negligence. If so, however, how can the insurance company pay out for ASD's liability while at the same time not have to pay out if the ASD is negligent? If this is an ambiguity, fundamental principles of tariff construction hold that the ambiguity is construed against the drafter, i.e., ASD. Or, alternatively, as I discussed earlier, one should read the tariff reasonably so as to give it a lawful effect. In either event, the provisions would be construed to authorize the insurance company to pay out for claims caused by the stevedore's, not ASD's negligence. The answer would not be to declare the entire tariff provision a nullity. In WGMA/Galveston, for instance, the Commission, after finding that the insurance provision unlawfully referred to and implemented an exculpatory tariff provision, ordered the insurance provisions modified to delete the objectionable portions only. WGMA/Galveston, cited earlier, 22 F.M.C. at 105.

ASD's only reply to complainants' argument that the insurance provisions are also exculpatory is that the Commission so held in WGMA/Galveston only because at Galveston the port had also included a direct exculpatory provision in its terminal tariff, and the Commission found that the insurance provision in the Galveston tariff was tied into the exculpatory provision, unlike the situation with ASD, which has amended its previously exculpatory provisions in its tariffs. ASD is correct as far as it goes. However, the argument overlooks the fact that even without a direct exculpatory provision, an insurance provision

which requires the user to pay premiums to an insurance company which in turn will cover the liability of ASD is an indirect means of relieving the terminal of the cost of its own negligence. This indirect means of determining who shall bear the cost of one's negligence by insurance has been found to be lawful in the towing industry. This development is significant because it was the Supreme Court's decision in Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955), concerning the towing industry, which is the seminal decision leading to the Commission's regulations banning exculpatory provisions in terminal tariffs.

In Bisso, the Supreme Court held that exculpatory provisions in towing contracts that released the tower from liability for the towers' own negligence were against public policy. See also Dixilyn Drill Corp. v. Crescent T. & S. Co., 372 U.S. 697 (1963). The Court so held in order to protect against the towers' overreaching and to discourage negligence by towers. Bisso, 349 U.S. at 91. Some time after the Bisso decision, however, parties to towing contracts adopted a new practice, namely, the user of insurance, to replace the previous exculpatory clauses in the towing contracts. As one authority has stated the modern situation (Schoenbaum, Admiralty and Maritime Law, cited earlier, sec. 4-15 at 152):

> . . . contracts releasing towers from liability for negligent towing of a barge are against public policy. (Citing Bisso.) This is a narrow exception, limited to towage contracts; the effect of the rule is largely obviated by provisions in towing contracts naming the tower as an additional insured.

In the footnote to the above quotation, the author states:

> Such clauses are a common feature in contracts of towing, carriage, charters, and service contracts.

Notwithstanding the holding in Bisso, some courts hold that agreements in towing contracts that arrange for one party to take out insurance, naming the other party (the tower) as insured, are not the same thing as the old, prohibited direct indemnification by one party for the other party's negligence. Consequently, in such cases and under the facts of those cases, the courts have found the insurance agreements to be lawful. See Fluor Western Inc. v. G & H Towing Co., 447 F.2d 35 (5th Cir. 1971), cert. den. 405 U.S. 922 (1972); Twenty Grand Offshore, Inc. v. West India Carriers, Inc., 492 F.2d 679 (5th Cir. 1974), cert. den. 419 U.S. 922 (1974); Dillingham Tug & Barge Corp. v. Collier Carbon & Chemical Corp., 707 F.2d 1086 (9th Cir. 1983), cert. den. 465 U.S. 1025 (1984). But when there has been no bargaining (as is generally the case with tariffs), the courts have found the insurance arrangement to be indirect exculpation in violation of Bisso. See PPG Industries, Inc. v. Ashland Oil Co., 592 F.2d 138, 145 (3rd Cir. 1978), cert. den. 444 U.S. 830 (1979). See also discussion in Schoenbaum, Admiralty and Maritime Law, cited earlier, at sec. 11-10.[29]

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[29] In Fluor Western, Twenty Grand, and Dillingham, the courts explained that having a user take out insurance and having the insurance company pay the tower in case of accident caused even by the tower's negligence was not the same thing as having the user indemnify, i.e., pay the tower directly out of the user's own funds. (See the explanation set forth in Twenty Grand, 492 F.2d at 686.) The courts felt that such insurance arrangements which were the results of bargaining between the parties did not contravene the Bisso decision, which was primarily concerned with monopolistic towers and overreaching by them. (See Twenty Grand, 492 F2d at 684-685.) It was also felt that "public policy was not concerned with which party paid for the insurance." In PPG Industries, however, cited above, 592 F.2d at 145, the Third Circuit Court of Appeals held that the insurance arrangement was merely indirect exculpation in violation of Bisso. However, the court noted that there had been no bargaining among the parties.

In the two cases in which the Commission has found insurance provisions to be unlawful as being extensions or implementations of direct exculpatory provisions in port tariffs, WGMA/Galveston and SEMCO v. GPA, the ports had also specifically included direct exculpatory provisions in their tariffs. The question arises as to whether the Commission would find insurance provisions to be unlawful if, as in the present case, there are no underlying direct exculpatory provisions in the terminal tariffs. Unfortunately, the parties have not addressed this problem. Indeed, only ASD has cited SEMCO and then in another connection. (Motion of ASD to Dismiss at 5 n. 2.) Nevertheless, it is apparent from both WGMA/Galveston and SEMCO that the Commission views indirect insurance arrangements to be extensions of direct exculpatory provisions. Thus, in WGMA/Galveston, the Commission struck down the insurance provision in part in the Galveston tariff, stating (22 F.M.C. at 105):

> It is unreasonable to require a user to indemnify the Port against the Port's own negligence, and it is equally unreasonable to require the user to insure that indemnity.

But perhaps more significantly, in SEMCO v. GPA, the Commission adopted the Initial Decision which had specifically considered the Fluor Western and Dillingham cases, which had been cited to the presiding judge as justifying the insurance requirement imposed by the Georgia Ports Authority. The judge, however, and the Commission which adopted his decision, distinguished Fluor Western and Dillingham because in those cases there had been bargaining unlike the situation with a public port where there had been no arms-length bargaining. (See 23 SRR at 549-550.) The Commission therefore treated the insurance provisions

as merely "an extended implementation of the exculpatory clauses of the tariff." (23 SRR at 550.) This decision, of course, follows the rationale of the Third Circuit Court of Appeals in PPG Industries, Inc., cited earlier, 592 F.2d at 145. In this regard, it is well to bear in mind that when promulgating its regulations prohibiting exculpatory provisions in terminal tariffs, the Commission considered the question of relative bargaining power between public terminal operators and users of their facilities with respect to tariff matters and found an inequality of such power. In other words, the Commission found that the publication of exculpatory provisions in terminal tariffs was not the result of equal bargaining. See Docket No. 86-15, Filing of Tariffs, etc., cited earlier, 23 SRR at 1603-1604.[30]

I conclude therefore that the Commission's decisions in WGMA/ Galveston and SEMCO v. GPA, cited earlier, consistent with the anti-exculpatory purposes of the Commission's regulations, prohibit ASD from

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[30] As the cited pages indicate, however, the Commission left open the question of bargaining power and lawfulness of exculpatory provisions in terminal leases and agreements, as to which the Commission instituted a separate rulemaking proceeding (Docket No. 86-32, Exculpatory Provisions in Marine Terminal Agreements and Leases, 51 Fed. Reg. 46694, December 24, 1986). The Commission's finding in Docket No. 86-15 makes it unnecessary to consider the offer of proof by No. 87-17 complainants that ASD's tariff terms are not negotiable or ASD's statements that they would discuss anything in their tariffs with the stevedores. It is also consistent with the findings of the courts that a tariff is essentially a unilateral promulgation, not a product of bargaining. See, e.g., Rorie v. City of Galveston, 471 S.W.2d 789, 8 SRR 20,713 (Tex. 1971); Galveston v. Kerr, 362 F.Supp. 289, 8 SRR 90,925 (S.D.Tex. 1973); Giacona v. Marubeni Oceano (Panama) Corp., cited earlier, 623 F.Supp. at 1568. The Commission's findings do not mean that public terminal operators like ASD are unwilling to discuss matters with their customers or to change their tariffs on request of their customers. They mean only that as to the matter of exculpation of the public terminal the Commission has removed that subject from discussion and forbidden the practice when it concerns tariffs.

requiring stevedores to take out and pay for insurance that names ASD as an insured and covers ASD's liabilities, in other words, that authorizes ASD or its insurer to have indemnification for its own negligence through the stevedore's insurance company, if not from the stevedore directly. The record is unfortunately scant in terms of evidence and argument on this particular matter because the issue has been treated apparently as incidental to the primary arguments concerning ASD's purported exculpatory provisions. Therefore, outside of the tariff provisions themselves and some evidence regarding Aetna's suing ENIC under the ENIC's policy with Ryan-Walsh, there is little or nothing about ASD's actual practices regarding its insurance provisions nor what the insurance policies actually say in detail. It could be argued, therefore, that summary judgment should be withheld pending further argument or evidence. See, e.g., Kennedy et al. v. Silas Mason Co., 334 U.S. 249, 256-257 (1948). However, in previous cases involving exculpatory provisions, which on their faces could authorize prohibited practices, the Commission has acted on scant evidentiary records as a matter of tariff interpretation. See, e.g., Central National Corp. v. Port of Houston, 22 SRR 795 (1984). Furthermore, as discussed earlier, perhaps the deficiencies in the record can be cured when the parties file their exceptions with the Commission.[31]

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[31] However, although the record is scanty as regards ASD's practices under the insurance provisions in its tariffs and contains nothing as to the reasons why ASD has such provisions in its tariffs, I can officially notice that neither GPA nor Galveston has comparable insurance provisions in the tariffs at those ports. See GPA Tariff No. 1-F, Item 120-A, 2d rev. p. 35 and 35-A; Galveston Wharves Tariff FMC-T No. 12, Item 180, 1st rev. page 11-A. I have, furthermore, seen no comparable insurance provisions in other terminal tariffs after a random inspection of them in the Commission's files. See 46 CFR 502.226.

Accordingly, as was done in WGMA/Galveston, cited earlier, 22 F.M.C. at 105 and 108, ASD should amend its tariff to remove those portions that could authorize ASD to have indemnification for ASD's own negligence by means of a stevedore's insurance and to conform to the amended indemnity provisions of Items 108 and 160 (assuming Commission jurisdiction over the ASD Bulk Plant facility).[32]

The final question concerns whether Aetna, with or without ASD's "acquiescence," is in fact seeking to have indemnification for the negligence of ASD or its employees by means of the insurance provisions in ASD's tariffs and the suits or other actions by Aetna against the stevedores' insurance companies. Although the record is scant concerning the insurance issue, as I have discussed, there is some indication that Aetna interprets the ASD's tariff provisions and the insurance, which the stevedores have taken out pursuant to ASD's tariff requirements, to require the stevedores' insurers to pay for injuries which may have been caused to the longshoremen by ASD's own negligence. Thus, according to the pleading in the Federal District Court for the Southern District of Alabama, Aetna is suing ENIC, Ryan-Walsh's insurer, and Aetna specifically asks the Court to "declare that the Plaintiff (i.e., Aetna) is not obligated to provide coverage or pay any claims by

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[32] It would be fair to add that ASD has not argued that its tariffs authorize exculpation or should authorize exculpation in the insurance provisions. ASD has only replied to complainants' arguments that tie the insurance provisions into purported exculpatory provisions elsewhere in ASD's tariffs. Therefore, ASD has not addressed the question whether the particular language in the insurance provisions (naming ASD as an insured, covering ASD's liabilities, but referring to Items 108 and 160 limiting indemnification) is inconsistent or confusing. Undoubtedly the Commission will have the benefit of ASD's arguments on this particular matter on exceptions or replies to exceptions.

any persons arising out of said accident of December 7, 1983 [to Mr. Johnny Drakes, Jr.] and ". . . to declare that Defendant [ENIC] is obligated to provide coverage and/or pay claims by any person arising out of said accident of December 7, 1983. . . ." (Exhibit No. 8 at paragraphs 9A and 9B.)

The above action by Aetna is evidence that ASD's tariffs need amending. Whether Aetna succeeds in its suit, it appears that Aetna believes that the insurance contracts mandated under ASD's tariffs require the stevedores' insurers to hold Aetna, ASD's insurer, harmless even if ASD had been negligent, which Mr. Drakes is alleging in his suit against Aetna. (See complaint attached to Exhibit No. 8.) Although, as I have discussed, the Commission has no jurisdiction over Aetna, the courts do, and to the extent that this decision serves as a declaratory order (as No. 87-13 complainants characterize the proceeding, Brief in Opposition at 31), the decision can guide the courts. In this regard, the decision holds that insurance provisions in ASD's tariffs that could authorize direct or indirect exculpation of ASD via insurance, i.e., require a stevedore's insurer to indemnify Aetna for any portion of damages or injuries caused by ASD's negligence, are in violation of the shipping acts.

Norman D. Kline

Norman D. Kline
Administrative Law Judge

Washington, D.C.
December 1, 1987

FEDERAL MARITIME COMMISSION

DOCKET NO. 87-13

PATE STEVEDORE CO. OF MOBILE, ET AL.

v.

ALABAMA STATE DOCKS DEPARTMENT

DOCKET NO. 87-17

ATLANTIC & GULF STEVEDORES OF ALABAMA
AND ALABAMA INSURANCE GUARANTEE ASSOCIATION

v.

ALABAMA STATE DOCKS DEPARTMENT AND
AETNA CASUALTY AND SURETY CO.

ORDER ADOPTING INITIAL DECISION

These consolidated proceedings were initiated by complaints alleging that the Alabama State Docks Department ("ASD") in its tariff and equipment rental agreements, as well as through the actions of its insurer, Aetna Casualty and Surety Co. ("Aetna"), seeks unlawfully to exculpate itself from liability arising from its own negligence, in violation of sections 16 and 17 of the Shipping Act, 1916 ("1916 Act"), 46 U.S.C. app. §§ 815 and 816, and sections 10(b)(12) and 10(d)(1) of the Shipping Act of 1984 ("1984

Act"), 46 U.S.C. §§ 1709(b)(12) and (d)(1).[1]

The case below was heard before Administrative Law Judge Norman D. Kline ("ALJ" or "Presiding Officer") on motions for summary judgment and for dismissal. No oral hearing was held. The Presiding Officer issued an Initial Decision ("I.D."), finding only the insurance provision of ASD's terminal Tariff No. 1-C to be violative of the Shipping Acts. Pate, ASD and Aetna have filed Exceptions to the I.D. All of the parties filed Replies to the Exceptions of others.

BACKGROUND

Pate Stevedore Co. of Mobile, Ryan-Walsh Stevedoring Co., Inc., and Murray Stevedoring Company, Inc., complainants in Docket No. 87-13, (collectively "Pate" or "Complainants") and Atlantic and Gulf Stevedores of Alabama ("A&G"), complainant in Docket No. 87-17, are the employers of four longshoremen injured in separate accidents while loading or unloading cargo on ASD's facilities. Complainants in these cases are these stevedores, who

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[1] Section 10(b)(12) of the 1984 Act provides that no marine terminal operator may "subject any person, locality or description of traffic to an unreasonable prejudice or disadvantage in any respect whatsoever." As it applies to the foreign commerce of the U.S., this section carries over intact the prohibitions of section 16, First paragraph of the 1916 Act. Likewise, section 10(d)(1) of the 1984 Act, which requires that no marine terminal operator may "fail to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property", prohibits the same actions and practices in the foreign commerce of the U.S. as did section 17 of the 1916 Act which it replaces.

operate in the Port of Mobile, Alabama at the docks of the ASD, and the insurance companies who issued liability insurance to the stevedores. Complainants seek to have certain ASD tariff provisions governing the use of its terminal and Bulk Plant facilities declared unlawful, and Aetna ordered to cease and desist from suing Complainants in the state and federal courts in Alabama.[2]

Aetna and ASD disclaim any attempt to seek exculpation for ASD's own negligence. ASD further claims that the Commission lacks jurisdiction over its Bulk Materials Handling Plant, that it is immune from suit before the Commission under the 11th Amendment to the Constitution as well as sovereign immunity, and that, in any event, its tariff provisions were amended in 1982 to conform to the

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[2] Aetna, ASD's insurer, is being sued in state and federal courts in Alabama under Alabama's direct action statute, by the injured longshoremen, employees of Complainants, alleging negligence on the part of ASD and others resulting in accidents and injuries to them while loading and unloading cargo on ASD's premises. Aetna has, in turn, sued the complainant stevedores and their insurers as third-party defendants in these suits alleging, inter alia, that the accidents were the result of negligence on the part of the stevedores; that the stevedores are obliged by the terms of ASD's tariff to indemnify ASD and, therefore, Aetna, from liability arising from or in connection with their operations on ASD's premises; and that the complainant insurance companies are obligated to provide a defense and pay any liability incurred by Aetna on behalf of ASD in these suits under insurance policies issued to the stevedores in which ASD is an additional named insured, as required by ASD's tariff. Although the courts in which the suits are pending have not certified or referred any specific issue to the Commission, the parties informed the Presiding Officer that the court proceedings are being held in abeyance pending the Commission's ruling on these complaints. See Initial Decision, 7, n. 3.

Commission's decisions and regulations, which prohibit the filing of provisions in the tariffs of marine terminal operators which exculpate or indemnify the marine terminal operator from liability for damages resulting from its own negligence. See 46 CFR § 515.7 (1987).

At issue are the tariff provisions of ASD's Tariff No. 1-C, applicable at its general cargo terminal and Tariff No. 11, applicable at its Bulk Plant.[3] Item No. 108 of Tariff No. 1-C provides, in part, that any user of a facility of the ASD shall indemnify and save ASD harmless from all claims, liability and expense, including attorneys fees and litigation expenses, in connection with loss of life, personal injury, and property damage occurring in connection with use of ASD facilities which is caused in whole or in part by the user or its employees, "except for any such loss occasioned by reason of [ASD's] own negligence." In addition, Item 108 requires that users of ASD facilities "waive all claims it may have against [ASD] for loss or damage covered under any insurance policy and shall cause its insurance carriers to waive any right of subrogation with respect thereto . . . ." Item No. 140 of Tariff No. 11 sets forth similar terms for the use of the Bulk Plant.

Item No. 116 of Tariff No. 1-C requires that any user of ASD's facilities keep in full force and effect a policy of public liability and property damage insurance in

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[3] These terms are more fully reproduced in the attached Appendix.

connection with its operations on ASD property naming the stevedore and ASD as the insured for liability arising out of or in connection with the operations of such stevedore on the property of ASD. Such policy must also "contain an endorsement insuring the stevedore's indemnity set forth in Item 108." Item No. 150 of Tariff No. 11 sets forth analogous requirements for the Bulk Plant.

Item No. 106 of Tariff 1-C, and Item No. 140 of Tariff No. 11, state that use of ASD's facilities shall constitute consent to all of the terms and conditions of the tariff and evidences agreement to be governed by the rules and regulations of the tariff.

INITIAL DECISION

The arguments presented by the parties below were canvassed and dealt with at length in the Presiding Officer's I.D. in ruling on the motions for summary judgment and dismissal. The Presiding Officer ruled that Aetna should be dismissed as a respondent because, despite its statutory status under Alabama's direct action statute, it is not a "marine terminal operator" or other person subject to the Commission's jurisdiction.[4] See I.D. 17-32.

The concerns of the stevedore companies that Aetna is attempting to obtain indemnification for ASD's own

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[4] Under the Shipping Acts, a marine terminal operator is one who is "engaged in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier." § 1, 1916 Act, 46 U.S.C. app. § 801; § 3(15), 1984 Act, 46 U.S.C. app. § 1702(15).

negligence, the Presiding Officer found, are best dealt with by "advis[ing] the courts, which have jurisdiction over Aetna and all the other parties, that under the Shipping Act, exculpatory provisions in tariffs of regulated marine terminal operators are invalid so that the courts can order Aetna to cease from asserting invalid rights . . . " if it is in fact doing so. I.D., 26. With respect to the allegations concerning Aetna's assertion of these tariff items in the court actions, he determined that the Commission could not, in any event, enjoin or otherwise prevent Aetna from pressing its litigation, but noted that the courts, by staying their actions pending determination of the lawfulness of the tariff provisions by the Commission, had essentially done so.

The Presiding Officer also ruled that ASD is not immune from suit before the Commission, finding ASD's arguments based on Alabama sovereign immunity and the 11th Amendment to the Constitution unpersuasive. The question of jurisdiction over the Bulk Plant could not be determined on summary judgment, he concluded, because a material question of fact exists as to whether ASD has ever served common carriers at that facility. He advised that it would be of questionable value to take the time and effort for a formal proceeding to determine the issue in view of his further holding on the merits of the indemnification issue, and suggested that, if necessary, the issue could be determined on remand.

In ruling on the merits of the allegations that ASD and Aetna are engaging in practices violative of the Shipping Acts, by seeking indemnification for ASD's own negligence in the pending suits, the Presiding Officer held that the tariff and Equipment Rental Agreement ("Agreement") provisions dealing with indemnity were not themselves violative of the Shipping Acts. The Presiding Officer found no evidence that either ASD or Aetna was attempting to secure indemnification for ASD's own negligence in those suits. The suits themselves did not constitute evidence of an attempt to do so, he ruled, and it would be premature to resolve the question of whether ASD was negligent prior to rulings by the courts in those cases. The Presiding Officer held that the impleader mechanism being used by Aetna in the court suits will permit trial of the various claims of negligence concurrently and the courts may provide for apportionment of any damages among joint tortfeasors based on the doctrine of contributory negligence.

The questions of Shipping Act law raised herein were determined to be separate from, and unaffected by, those issues, which are best left to the courts. The ALJ concluded that the evidence presented did not show that ASD or its insurer is seeking to use the indemnity provisions of the tariff to escape liability for ASD's negligence.

The challenged provisions of the equipment rental agreement covering use of ASD's cranes, the ALJ found, were not contained in the tariff, as required by the Commission's

rules. This failure was not found, however, to render the Agreement unenforceable.

The ALJ determined that the Agreement terms regarding indemnification were not ambiguous. He explained that although such terms do not specifically except from indemnification any liability for ASD's own negligence, they do indicate that the Agreement as a whole is subject to and incorporates the provisions of the tariff, which does reflect the limitation of indemnity for ASD's own negligence. Thus, by incorporating those tariff terms, the Agreement itself was found not to require indemnification of liability arising from the negligence of ASD.

The ALJ specifically found that the indemnity, waiver of claims and consent provisions of the tariff, and the relevant provisions of the Equipment Rental Agreement, were not in violation of the Shipping Acts or Commission regulations and that no basis appeared to declare them nullities due to any ambiguities. In further explanation he stated that

> It should be strictly understood, furthermore, that it is unlawful under the shipping acts for any regulated marine terminal operator such as ASD either to publish provisions in its tariffs which authorize exculpation for ASD's own negligence or for ASD to carry out exculpatory practices under its tariffs at any facility which is subject to the Commission's jurisdiction. I.D., 72.

However, the Presiding Officer went on to find that the insurance provision of the tariff raises issues with respect to exculpation of ASD for its own negligence not previously dealt with. The problem is said to arise because ASD

requires that users take out insurance for public liability and property damage naming the user and ASD as the insured and that the policy be for liability of ASD resulting out of or in connection with the operations of the user on the property of ASD, and contain an endorsement insuring the stevedore's indemnity set forth in the separate indemnity provision. Noting that the arguments of the parties with respect to this requirement were related to application of the indemnification provision, the ALJ indicated concern that the parties did not focus on whether this provision standing alone had the effect of releasing ASD from liability for its own negligence at the expense of the stevedores.

The Presiding Officer pointed out, however, that Aetna is, in fact, demanding in its suits against the insurers of the stevedores that they defend ASD, and cover any liability ASD may be found to have, as a named insured under those insurance policies. Thus, he framed the issue as

> . . . whether the current insurance Items 116 and 160, which refer specifically to the amended Items 108 and 160, respectively, are themselves unlawful either because of ambiguity or because they are indirect means of exculpating ASD for ASD's own negligence. Furthermore, if so, are they to be declared complete nullities as complainants ask? I.D., 75

The ALJ determined that there are ambiguities in the insurance provisions, but that they could be "read so as to give them legal effect to the extent that they are not permitted to exculpate ASD indirectly by means of insurance." Id. He suggested that the parties use the

opportunity available on exception to the Commission to correct inadequacies in the record.

The Presiding Officer discussed the development in court and Commission cases of the prohibition against exculpatory provisions in marine terminal tariffs, noting however that Commission cases dealing with exculpatory clauses had dealt with similar insurance clauses only as a related matter or in a subordinate fashion. He explained that the Commission's proscription against exculpatory clauses in marine terminal operators' tariffs was based upon the Supreme Court's decision in Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955), which involved the towing industry. He noted that, in that case, the Supreme Court invalidated a clause in a towage contract exculpating the tug boat operator from liability for its own negligence as contrary to public policy. The ALJ pointed out that subsequent cases in the U.S. Circuit Courts of Appeal have upheld clauses requiring the barge owner to secure insurance naming the tower as insured, citing Fluor Western, Inc. v. G & H Offshore Towing Co., 447 F.2d 35 (5th Cir. 1971), ("Fluor") cert. den., 405 U.S. 922 (1972); Twenty Grand Offshore, Inc. v. West India Carriers, Inc., 492 F.2d 679 (5th Cir.), cert. den., 419 U.S. 836 (1974); Dillingham Tug & Barge Corp. v. Collier Carbon & Chemical Corp., 707 F.2d 1086 (9th Cir. 1983), ("Dillingham") cert. den., 465 U.S. 1025 (1984). He noted, however, that the Third Circuit has distinguished these cases and ruled such insurance

clauses invalid, as indirectly exculpatory in contravention of Bisso, in situations in which there is no bargaining between the parties over contract terms. PPG Industries, Inc. v. Ashland Oil Co. - Thomas Petroleum Transit Div., 592 F.2d 138 (3rd Cir. 1978) ("PPG"), cert. den., 444 U.S. 830 (1979).

The Presiding Officer further noted that the Commission dealt with and invalidated insurance provisions in two cases, West Gulf Maritime Association v. City of Galveston, 22 F.M.C. 101 (1979), reconsid. den., 22 F.M.C. 401 (1980) ("WGMA"), and Southeastern Maritime Co. v. Georgia Ports Authority, ___ F.M.C. ___ (1986), 23 S.R.R. 941 (1986) ("SEMCO"), but only in connection with, and as extensions or implementations of direct exculpatory provisions in terminal tariffs which were found invalid. The ALJ nevertheless references the Commission's statement in WGMA that

> It is unreasonable to require a user to indemnify the Port against the Port's own negligence, and it is equally unreasonable to require the user to insure that indemnity. 22 F.M.C. at 105.

The Presiding Officer also points out that the Commission, in adopting the initial decision in the SEMCO case, adopted the reasoning of the Third Circuit in PPG, which was reflected in that case's discussion of the Fluor and Dillingham cases in the I.D. The same reasoning was expressed by the Commission, the Presiding Officer notes, in promulgating its regulations prohibiting exculpatory clauses in terminal tariffs, 46 C.F.R. § 515.7, Docket No. 86-15, Filing of Tariffs, etc., 23 S.R.R. 1603-1604, 51 FR 46670, December 24, 1986.

Thus, based on Commission and court cases which hold that a tariff is a unilateral promulgation, not a product of bargaining, in which the terminal operator may not include clauses directly exculpating itself from liability for its own negligence, the Presiding Officer concluded that Commission precedents require invalidation of tariff provisions by which terminal operators indirectly secure exculpation through insurance policies paid for by stevedores. He therefore ruled that ASD's insurance provisions are unlawful to the extent that they require stevedores to take out and pay for insurance that names ASD as insured and covers ASD's liability for its own negligence, and ordered ASD to amend its tariffs to conform such provisions to the amended indemnity provisions and to delete coverage for ASD's own negligence.

Finally, with respect to the question of whether Aetna is seeking to use the insurance provisions in a manner which would indemnify ASD for its own negligence, the Presiding Officer concluded that the record, though scant, did include some evidence that Aetna was attempting to enforce the insurance provisions and the stevedore's insurance policies in the court cases in this manner. Therefore, in order to guide the courts, he held that "insurance provisions in ASD's tariffs that could authorize direct or indirect exculpation of ASD via insurance, i.e., require a stevedore's insurer to indemnify Aetna for any portion of damages or injuries caused by ASD's negligence, are in violation of the shipping acts." I.D., 83.

DISCUSSION

Complainants in Docket No. 87-13 and respondents, ASD and Aetna,[5] filed Exceptions to the Initial Decision. Each party, including A&G, complainant in Docket No. 87-17, filed a Reply to the Exceptions of other parties. The Commission heard oral argument, in which all parties participated.

The I.D. includes extensive substantive discussion of the issues raised in these cases. The Presiding Officer's disposition of the issues is proper and well-founded. Therefore, as further discussed below, the I.D. is adopted in all respects, and the Exceptions of Respondents and complainant Pate are denied. The issues and arguments raised by the parties in Exceptions and Replies are discussed and decided as follows.

A. The Insurance Provision

Aetna excepts to the I.D.'s holding that the insurance provision is violative of the Shipping Acts, but only to the extent that past practices under it are called into question. Thus, Aetna argues that the validity of the tariff "between" the terminal operator and stevedore, has no bearing on the validity of an insurance contract already in existence. Aetna's position is that the contracts of insurance paid for and entered into by the stevedores are

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[5] Having been dismissed as a respondent by the Presiding Officer in the I.D., the position of Aetna on exception and at oral argument was somewhat anomalous. It was, however, never clarified, despite questions to counsel. Transcript of Oral Argument at 17.

the basis of its court actions against the other insurance companies and that its claims under those contracts do not depend in any way upon the enforceability of the tariff. Thus, Aetna asserts that it is entitled as ASD's statutory surrogate to seek enforcement of the insurer's obligations to ASD as an insured party under those contracts.

ASD also excepts to the I.D.'s discussion of the insurance issue at pages 72-83 and the holding that the insurance provision of its tariff violates the Shipping Acts. ASD argues that the purpose of the insurance provision is to assure that injured individuals are protected and states that it has never invoked the insurance provision to protect ASD when it is negligent. In support of this statement it offers two affidavits, attached to its Exceptions, from employees of ASD. ASD further argues that the insurance clause "gives ASD no greater protection than the primary indemnity provision, which does not protect ASD from its own negligence . . .," and states that it does not interpret the named insured clause to insure ASD against its own negligence.

Pate replies to Respondents' Exceptions, urging that the ALJ's ruling on the insurance issue be upheld. Pate argues that the "named insured" provision is extra, i.e., coverage in addition to that required to cover the stevedore's own liability and to insure the required indemnity, and permits the ASD to recover for its own negligence at the stevedore's expense. Pate characterizes

ASD's assertions that it does not interpret the named insured provision to protect itself against its own negligence as "disingenuous and irrelevant," because ASD, being immune from suit, is not faced with the question. It is, moreover, allegedly not the view of ASD's insurer who is subject to suits on ASD's behalf and is asserting rights derived from ASD in court.

A & G takes issue with Respondents' Exceptions on the insurance issue, stating that the named insured clause provides ASD with full liability coverage, including coverage for its own negligence. With respect to ASD's assertion that it has never invoked the insurance clause to protect it against liability for its own negligence, A & G points out that both ASD and Aetna have demanded representation by A & G's insurer in the state court in the case brought by a longshoreman alleging negligence by ASD alone. A & G states that those demands for representation were not limited to the indemnity provision of the tariff, contrary to ASD's assertion before the Commission. A & G also alleges that, although no additional premium is paid by the stevedores to cover ASD as a named insured, the requirement is not without cost because the premiums at renewal reflect the cost of claims against the stevedores' insurers arising from ASD's coverage.

Aetna argues on Reply to the Exceptions that the Presiding Officer and Complainants have confused insurance and indemnity. The insurance contracts covering ASD should

be enforced according to their terms, without reference to the tariffs under consideration here, Aetna argues. Aetna allegedly does not seek exculpation from any party's liability to the injured individual, but, it says, is seeking in its third party complaints only indemnification for the negligence of the stevedores which was the cause of the injury.

With respect to the substance of the insurance issue under the Shipping Acts, the relevant issues were addressed in the I.D. In finding that the tariff's insurance provision violates the Commission's prohibition in WGMA against exculpatory clauses in terminal tariffs by accomplishing indirectly what may not be done directly, the I.D. discussed the relevant case law and framed the question for the Commission. The Commission agrees with the ALJ that ASD abuses its superior bargaining power vis a vis the stevedores seeking to use its facilities by requiring in its tariff that stevedores maintain and pay for insurance policies governing public liability and property damage in which the terminal operator is named as an insured.

We find nothing in the materials filed on Exceptions and Replies, in the oral arguments, or in post-argument

filings,[6] to detract from the logical path followed by the Presiding Officer from the cited cases and rulemaking on exculpatory clauses to the insurance clause in this case. His conclusion that Item No. 116 is violative of the Shipping Act was based on ambiguities in the insurance clause which could be read to require that the insurance policy to be secured by stevedores cover ASD for any liability arising in connection with the stevedores' operation including liability for negligence on the part of ASD. The ALJ was not, however, able to determine on the record before him whether the claims asserted by Aetna in the court cases involved assertions of coverage secured by the stevedores for ASD's own negligence, although that appeared to be the case.

At the suggestion of the Presiding Officer, the record has been supplemented by the parties on Exceptions and Replies. Additional material filed with A & G's Reply to Exceptions as well as the additional, post-argument Exhibits filed by it, support the Presiding Officer's conclusion that

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[6] At oral argument, A & G again urged the Commission to find that Aetna and ASD were unlawfully seeking to escape liability for negligence on the part of ASD in the court actions brought by Aetna. In connection with this argument, counsel for A & G read from pleadings filed by Aetna in its declaratory judgment action against A & G's insurer, and offered to submit the document, not previously part of the record. See Transcript of Oral Argument, 54. Following oral argument, A & G did submit the pleadings with a letter to the Commission. Opposition to the filing as untimely was filed by Aetna and ASD, and a reply (denominated a "Statement In Support" of its filing of exhibits) was filed by A & G.

the insurance clause has been used to secure insurance which Aetna, if not ASD, asserts covers the liability of ASD for any negligence of its own. The Commission therefore adopts the Presiding Officer's finding that the insurance clause is unlawful to the extent that it has required stevedores to secure insurance coverage for ASD's liability for its own negligence, on the basis of the record as a whole.[7]

B. Notice

ASD further takes exception to the I.D.'s determination of the insurance issue on grounds that it had no notice that the named insured clause was at issue and that it had no opportunity to develop a factual or legal record with respect to the issue. ASD contends that the named insured clause was never separately asserted as an invalid

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[7] A & G's post-argument Notice of Filing of Additional Exhibits refers to a "request made at oral argument." Examination of the transcript indicates only that counsel for A & G read from the court pleadings at oral argument and offered at that time to file the pleadings to supplement the record below. No response to that offer was made by any Commissioner and no party objected at the time. Two parties - ASD and Aetna - have filed objections to the A & G Notice. ASD's objections are based on untimeliness of the submissions, and Aetna (still characterizing itself as a respondent) objects both on grounds of untimeliness and incompleteness of the filing, alleging that A & G, in failing to inform the Commission of certain rulings in the case by the Alabama court, has failed to apprise the Commission of the "whole truth." In view of the Presiding Officer's invitation to the parties to supplement the record on Exceptions, taken advantage of by all parties prior to oral argument, we see no reason to reject the materials filed by A & G. The objections of ASD and Aetna to receipt of these materials are denied. We note, moreover, that the alleged untimeliness of A & G's submission did not prevent a similar effort by ASD at oral argument in circulating a revised draft tariff item.

exculpatory provision and that the I.D. therefore was based on an entirely different legal theory than that which was set forth in the complaints and litigated below.

Pate points out in reply that the insurance provision was among those enumerated in the complaint which sought to have all of the exculpatory provisions referred to declared unlawful. Pate also raised the issue, it asserts, in alleging that the actions of Aetna, in filing suit against the stevedores' insurers and claiming the rights of ASD under the policies, were violative of the Shipping Acts.

A & G likewise argues that ASD had notice that the insurance provision was in issue because Item No. 116 was mentioned specifically or quoted in each of the complaints, and in the motions and briefs of the parties on summary judgment, including ASD's argument that the provision was lawful advanced in its reply to Complainants' Motion for Summary Judgment.

Pate's objections on Exceptions that the insurance issue was improperly determined in the I.D. because it had no notice that the provision was at issue were overstated and, in any event, were cured at oral argument.[8] Moreover, the lawfulness of the insurance provision is, as counsel for

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[8] In fact, each of the parties was asked at oral argument whether the insurance issue in this case could be determined by the Commission at this stage of the proceeding without remand. Counsel for each of the parties, including ASD, which had argued lack of notice in its Exceptions, responded that the issue could be determined by the Commission without further proceedings. See Transcript of Oral Argument at 13, 61 and 79.

Pate noted at oral argument, not a "fact driven question"[9] but an issue of law, which may appropriately be determined on the motions for summary judgment and the present record. ASD's Exceptions with respect to lack of notice that the lawfulness of the insurance clause was at issue are denied.

C. Indemnity Provisions and Equipment Rental Agreements

Pate excepts to the I.D.'s finding that (1) the indemnity provisions are not themselves unlawful or ambiguous; (2) there is no evidence that ASD or Aetna is engaging in unlawful exculpatory activities; and (3) the tariffs need not be further amended. Pate urges that ASD be required to utilize better language in its tariff, and that its present provisions should be found unlawful, on the grounds that users of the port should not be required to rely upon the general standards of tariff interpretation and court action to insure that tariff provisions to which they must adhere will be read reasonably and construed correctly by parties (i.e. courts and insurance companies) not versed in Shipping Act issues. Pate also argues that the manner in which the tariff terms are being applied by ASD and its insurer, Aetna, constitutes practices which violate the Shipping Acts and could be avoided by requiring clarification of the tariff terms.

Pate submits that ambiguity in the indemnity provisions arises from the fact that the exception for indemnity for

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[9] Transcript of Oral Argument, 13.

ASD's own negligence is general - i.e., it does not refer to ASD as the sole or partial cause of damage - while the requirement for indemnity by the stevedores refers to the stevedore as the cause of damage in whole or in part. Pate states that the plaintiffs in the court suits are not alleging negligence on the part of the stevedores, but only on the part of ASD. Pate also points out that Aetna's third-party complaints are based, in part, on the tariff indemnity provisions, and that Aetna is alleging negligence on the part of the stevedores. Pate urges that the waiver of claims provision is itself unlawful, even in the absence of the indemnity clause, because it could result in the stevedore being held fully liable without recourse, for damages resulting from negligence for which ASD was contributorily responsible.

ASD characterizes Pate's suggestion that ASD amend its tariff and should be forced to do so by being found in violation of the Shipping Acts as "outrageous." ASD suggests that Pate's real complaint is that ASD has not acted to prevent Aetna from taking positions Pate does not like. Nevertheless, ASD submits that,

> [t]here is nothing in maritime regulatory law which would require or allow the agency to punish ASD for any action Aetna has or has not taken. The actions of Aetna are not matters involving common carriage of cargo, or the handling of cargo.

ASD's Reply to Exceptions, 5. ASD asserts that Aetna's suits in the state courts are non-maritime, insurance disputes which are only incidentally related to the meaning of the tariff.

The Presiding Officer considered Complainants' challenge to the indemnity provisions of the tariff and the rental agreement and correctly concluded that those provisions did not contravene the Commission's prohibition against exculpatory practices on the part of marine terminal operators. The indemnity discussion in the I.D. balances the rights of the terminal operator to establish its own tariff terms without prescriptive language promulgated by the Commission against the prohibition of exculpatory tariff provisions. The Presiding Officer's assessment that the indemnity sections of the tariffs and the rental agreements are not ambiguous and may be read reasonably and given legal effect by the courts in these suits is well grounded. The Exceptions of Pate concerning these provisions are therefore denied.

D. Jurisdiction over ASD's Bulk Plant

Pate excepts to the I.D.'s finding that the Commission's jurisdiction or lack thereof over the Bulk Plant could not be determined. Pate asks the Commission to reverse the I.D. either on the grounds that "holding out" to serve without excepting common carriers is a sufficient basis for Commission jurisdiction,[10] or because the factual

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[10] Complainants argue on Exceptions, as they did below, that the Commission's jurisdiction over a marine terminal may attach upon a finding that the terminal holds itself out to serve carriers generally, including - or merely not excluding - common carriers, rather than upon the required finding that the terminal has actually served common carriers. See I.D. at 34-35.

issue of whether common carrier vessels have been loaded or unloaded at the Bulk Plant should have been tried and determined below. Finally, in Reply to Respondents' Exceptions, Pate also asserts that common carrier vessels have called at the facility and attaches an affidavit so stating.

ASD, on the other hand, urges the Commission to rule that it lacks jurisdiction over the Bulk Plant on grounds that it does not serve common carriers. ASD supplements the evidence presented below, consisting of affidavits of ASD employees presented by it indicating that the facility was unsuitable for common carrier service due to the size and nature of the commodities handled, with an affidavit stating that no common carrier has called at the facility in the past 10 years and that ASD does not offer the bulk facility for the use of common carriers.

The Presiding Officer's disposition of the Bulk Plant jurisdictional issue appears appropriate, particularly in view of the conflicting affidavits filed on Exceptions and Replies. He held that, absent a Commission ruling that "holding out" to provide services to vessels, not excluding common carriers, is a sufficient basis for Shipping Act jurisdiction over marine terminal operators, jurisdiction over ASD's Bulk Plant could not be determined on the present record on Motions for Summary Judgment and Dismissal. Under the applicable jurisdictional test, this issue is one of

fact.[11] That determination of fact may appropriately be left to the courts in the pending actions.

The ALJ's ruling on this issue comports with the rest of his careful division of Shipping Act issues of law appropriate for determination by the Commission from issues of fact and non-Shipping Act legal issues which can appropriately be left to the state and federal courts in which suits are pending. The tariff provisions for the Bulk Plant are subject to the Commission's jurisdiction, and therefore to the findings as to lawfulness herein applicable to the same provisions in ASD's terminal tariff, only if it is determined that common carriers have been served at the bulk facility.

E. Jurisdiction over Aetna

Pate takes issue with the Presiding Officer's ruling that Aetna is not subject to the Commission's jurisdiction. Pate argues that the Commission should find jurisdiction over Aetna on grounds that it stands in place of a marine terminal operator subject to the Shipping Acts and that its claims to indemnity under ASD's tariff constitute practices which violate those Acts and the Commission's regulations. Thus, Pate asserts that it is not asking the Commission to enjoin Aetna from litigating its court cases but to order ASD to enforce reasonable practices by preventing its

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[11] We decline to reexamine as a matter of law the long established test for Commission jurisdiction over marine terminal operators on the basis of the record in this case.

insurer from asserting claims in court that ASD could not assert itself.

The Presiding Officer's determination that Aetna is not a person subject to the Shipping Acts and should therefore be dismissed as a Respondent is well supported. The question of the degree to which Aetna may successfully enforce the existing insurance contracts, without regard to the lawfulness of the tariff provisions which caused them to be brought into being, is not for the Commission to determine. The Commission here determines the lawfulness of ASD's tariffs and activities. It is for the state and federal courts in Alabama to determine to what extent Aetna's rights and obligations are derivative from the rights and obligations of ASD under the Alabama direct action statute, and how the Commission's ruling with respect to the tariff and activities of ASD affects Aetna's rights and obligations. Alabama courts can then apply the determinations under the Shipping Acts litigated here to the claims asserted by Aetna derived from its insured, ASD, in

the state and federal court litigation.[12]

CONCLUSION

We find that it is an unfair or prejudicial use of the marine terminal operator's superior bargaining position through its tariff to shift the cost of liability insurance for damages occurring in connection with the activities of stevedores from itself to the stevedores without distinguishing between damages resulting from its own negligence and the negligence of others. Item No. 116 of ASD's terminal tariff violates sections 16 and 17 of the 1916 Act and sections 10(b)(12) and 10(d)(1) of the 1984 Act to the extent that it requires a stevedore's insurer to indemnify ASD or Aetna for any portion of damages or injuries caused by ASD's negligence. Based on the record of this proceeding as a whole, the Commission denies the

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[12] We note, however, that procedurally as well as substantively in its presentations to the Commission, Aetna apparently wishes to have it all. Although it insists that the litigation in the courts involves only a dispute among insurance companies concerning contract law, to which the Shipping Acts are inapplicable, it also makes substantive Shipping Act arguments. For example, Aetna asserts that there is no disparity in bargaining power between ASD and the stevedores which might be a basis for invalidating the insurance provision. See Transcript, at 32. Similarly, having been granted its request that it be dismissed as a respondent in this case, Aetna nevertheless continues to claim the rights and privileges attendant upon the status of a party to the proceeding, including presenting oral argument and filing objections to the filings of Complainants. It seems to us that there is also an inconsistency inherent in Aetna's claims in court to the right to assert demands derived from ASD's tariffs and Equipment Rental Agreements without respect to the limitations imposed upon ASD by the Shipping Acts.

Exceptions of Aetna and ASD to the Presiding Officer's disposition of the insurance issue, the opposing Exceptions of Pate and ASD with respect to the Commission's jurisdiction over the bulk facility, Pate's Exceptions to the dismissal of Aetna as a party and the Presiding Officer's failure to find the indemnity provisions of the tariff and the Equipment Rental Agreement in violation of the Shipping Acts, and adopts the Initial Decision.

These determinations will leave to the state and federal courts those factual questions, involving actual negligence and common carrier calls at the Bulk Plant, and questions of law not subject to the Commission's jurisdiction, most appropriately dealt with in those fora. The question of what effect may be given the insurance policies secured by the stevedores in compliance with the tariff requirements, and the extent to which Aetna's claims against the insurers are based on ASD's rights stemming from the tariff provisions, may be determined in the state and federal court actions, based upon the Commission's determination of the Shipping Act issues herein.

THEREFORE, IT IS ORDERED, That the Exceptions of all parties are denied;

IT IS FURTHER ORDERED, That the Initial Decision issued in this proceeding is adopted and made a part hereof;

IT IS FURTHER ORDERED, That ASD amend its tariff within thirty days to remove those portions that could authorize ASD to have indemnification for ASD's own negligence by means of a stevedore's insurance and to conform to the amended indemnity provisions, and notify the Secretary of the Commission within 15 days thereafter; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

Joseph C. Polking
Secretary